

highways, runways, taxiways, alleys, trails, paths, parking areas, and other similar projects not incidental to building or heavy construction.

Examples

- Alleys
- Base courses
- Bituminous treatments
- Bridle paths
- Concrete pavement
- Curbs
- Excavation and embankment (for road construction)
- Fencing (highway)
- Grade crossing elimination (overpasses or underpasses)
- Guard rails on highway
- Highway signs
- Highway bridges (overpasses; underpasses; grade separation)
- Medians
- Parking lots
- Parkways
- Resurfacing streets and highways
- Roadbeds
- Roadways
- Runways
- Shoulders
- Stabilizing courses
- Storm sewers incidental to road construction
- Street Paving
- Surface courses
- Taxiways
- Trails

Unless the Wage and Hour Division advises otherwise, as set forth below, the descriptions and classifications above are to be utilized by contracting agencies in selecting the appropriate wage schedule from the Federal Register and in determining the application of multiple schedules issued by the Wage and Hour Division. The advertised and contract specifications should identify as specifically as possible the structures to which the schedule applies and only the appropriate schedule(s) from the Federal Register should be incorporated into the specifications. Where multiple schedules are issued for a project by the Wage and Hour Division, they are to be utilized in the specifications and any applicable instructions regarding their use are to be observed.

To ensure that appropriate schedules are issued by the Wage and Hour Division, contracting agencies are reminded of their responsibility to provide a sufficiently detailed description of the project to enable the Wage and Hour Division to determine the character of the project. If structures in more than one category of construction are involved, such structures should be identified, together with an estimate of the cost of those structures in dollar amounts and in relation to total project cost.

Furthermore, contracting agencies have the authority only in the first instance to designate the appropriate

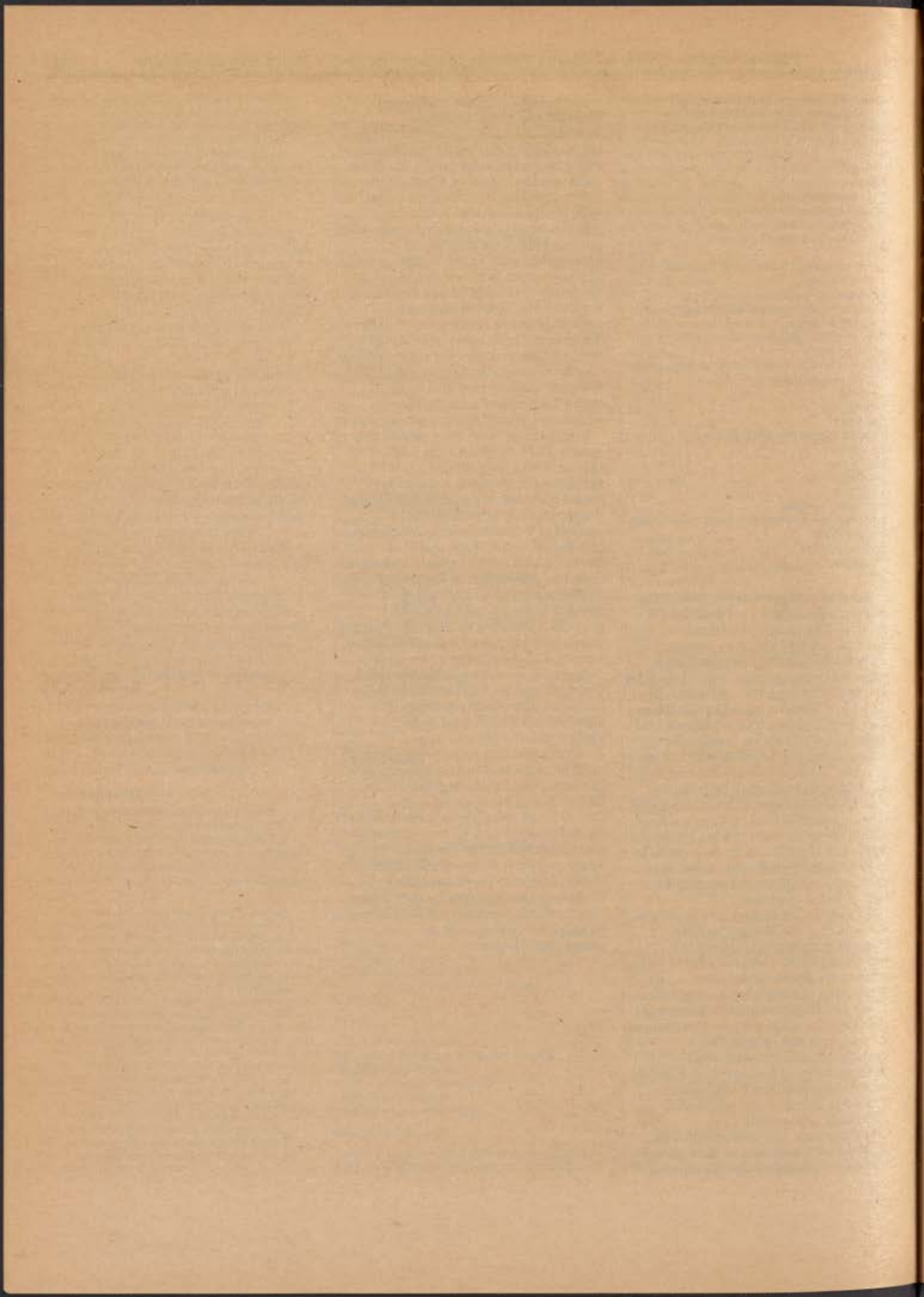
wage schedule(s) from the Federal Register and, in the absence of instructions from the Wage and Hour Division, to determine the application of multiple schedules issued by the Wage and Hour Division in project wage determinations. It is recognized that in individual cases or with respect to specific areas of the country, application of these guidelines may not be appropriate, such as where the category of construction is not clear and a definitive area practice has developed. For example, major bridges are ordinarily heavy construction, but have attributes of both heavy and highway construction; accordingly, area practice may be of great significance. Similarly, pumping stations vary greatly in sophistication and construction techniques, requiring close examination.

In any instance where a contracting agency has a question regarding application of the guidelines to a specific case, or where a question is raised by interested parties concerning the appropriate schedule(s) to be applied to a contract, the question is to be referred to the Wage and Hour Division. This referral should include a complete description of the project, any evidence available regarding area practice of wages paid on similar projects, comments by interested parties which may have been submitted to the agency, and the agency's own view.

Agencies are advised that the U.S. Court of Appeals for the Fifth Circuit has ruled that where a party has objected to a Federal agency's application of a general wage determination to a project, the question must be submitted to the Department of Labor pursuant to the regulations, 29 CFR 5.13, and bid opening cannot proceed until the dispute is resolved by the Secretary. *North Georgia Building and Construction Trades, supra*. The Wage and Hour Division will endeavor to cooperate with the contracting agencies in acting expeditiously with a view towards procurement deadlines.

[FR Doc. 81-1343 Filed 1-12-81; 11:28 am]

BILLING CODE 4510-27-M



federal register

Friday
January 16, 1981

Part VIII

Department of Labor

Employment Standards Administration
Wage and Hour Division

Service Contract Act; Labor Standards
for Federal Service Contracts; Final Rule

DEPARTMENT OF LABOR**Wage and Hour Division, Employment Standards Administration****29 CFR Part 4****Service Contract Act; Labor Standards for Federal Service Contracts**

AGENCY: Wage and Hour Division, Employment Standards Administration, Labor.

ACTION: Final rule.

SUMMARY: This rule revises Regulations, Part 4, Labor Standards for Federal Service Contracts, issued under the Service Contract Act. These regulations represent the first thorough substantive updating and clarification of these regulations since 1968. Most changes are made to reflect longstanding policies, rulings, and interpretations developed in the course of our experience in administering and enforcing the Act over the years. Essentially, this revision codifies these policies, rulings, and interpretations for the information and guidance of various interested parties, including employees and their representatives, contractors or potential contractors and their associations and Federal procurement agencies.

EFFECTIVE DATE: February 17, 1981.

FOR FURTHER INFORMATION CONTACT: Dorothy P. Come, Assistant Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Room S-3502, 200 Constitution Avenue, N.W., Washington, D.C. 20210, Telephone: 202-523-8333.

SUPPLEMENTARY INFORMATION: On December 28, 1979, a document was published in the Federal Register (44 FR 77036) proposing to revise, update, and clarify Regulations, 29 CFR Part 4, so that contracting agencies, contractors or potential contractors, and employees could be more fully apprised of their responsibilities and rights under the Service Contract Act and be provided with a current statement of the policies and interpretations followed by the Department of Labor in administering and enforcing the Act.

Numerous changes, clarifications, and revisions have been made to dispel misunderstandings and confusion that have arisen with respect to some of these policies.

In addition, several changes have been made which address certain concerns expressed by contracting agencies relative to the efficient administration of the Act as it relates to the procurement process. Many editorial

and clarifying changes have also been made.

Persons interested in the proposed rulemaking were afforded the opportunity to submit comments to the Wage and Hour Division within 60 days after publication of the proposal in the Federal Register. On February 15, April 1, May 23, June 24, July 25, September 28, and October 24, 1980, notice was given in the Federal Register extending the time for public comment. The period for comments was terminated on November 24, 1980.

The April 1, 1980 extension was granted in order to allow the comment period for this Part to run concurrently with that for the related procedural rules in Parts 6 and 8 of this Title, published in proposed form on April 22, 1980. The other extensions were granted at the request of various interested parties who needed additional time to prepare their comments.

Overall, comments were received from approximately 450 interested parties, including Members of Congress, contracting agencies, labor unions and organizations, contractor associations, contractors, business organizations, and others.

Among those Federal agencies submitting comments were the Executive Office of the President—Office of Science and Technology Policy, the Department of Defense, the General Services Administration, the Department of Energy, the National Aeronautics and Space Administration, the Department of Agriculture, the Federal Aviation Administration and the Small Business Administration.

Contractor associations and business organizations submitting comments included the Council of Defense and Space Industry Associations, the Computer and Business Equipment Manufacturers Association, the National Council of Technical Service Industries, the National Star Route Mail Carriers' Association, the Scientific Apparatus Makers Association, and the Chamber of Commerce of the United States.

Among the individual firms who commented were Pan American World Airways, Inc., Datapoint Corporation, Northrop Corporation, Xerox Corporation, Trinidad Corporation, McDonald Douglas Corporation, Rockwell International, the Boeing Company, and attorneys representing the Bell and Howell Company, Southern Packaging and Storage Company, Inc., and Chromalloy Metals Tectonics Company.

Labor unions and organizations commenting on the proposal included the American Federation of Labor—Congress of Industrial Organizations

(AFL-CIO) and its Department of Economic Research and Department of Professional Employees; and affiliated councils and unions of the AFL-CIO, including the International Brotherhood of Electrical Workers, the International Association of Machinists and Aerospace Workers, the American Federation of Government Employees, the Service Employees International Union, the International Union of Operating Engineers Local No. 3, and the United Brotherhood of Carpenters and Joiners of America, the Washington State Labor Council, the International Woodworkers of America, Seafarers International Union of North America, Laborers' International Union of North America, and the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada—Motion Picture Laboratory Technicians Local 780. Comments were also received from the Center to Protect Workers' Rights and the Contract Loggers Employee Association.

Several general comments were received, usually either in support or opposition to the proposal, while several others requested that public hearings regarding the proposed changes to the Regulations be held and/or requested the preparation of a regulatory analysis.

Since the long extended public comment period has given all interested parties ample opportunity to submit their views, it was decided that public hearings were not necessary.

It has been determined that the amendments to these Regulations do not meet the criteria of Executive Order 12044 and the Department of Labor Guidelines (44 FR 5570) for a regulatory analysis. The revised portions of the regulations essentially clarify interpretations, policies, and procedures, and do not, in any event, cause major cost/price increases.

The following is an analysis of all the principal comments received and a description of the changes made to the proposed rule because of these comments. Each submission has been thoroughly reviewed, and each criticism and suggestion has been given careful consideration. For each section and, where appropriate, subsection of the final rule, the analysis contains a description of the major substantive comments and recommendations, the Department's findings as to whether or not suggested changes to the proposed rule would be in accord with the language and intent of the SCA, and a discussion of the substantive changes adopted, if any. Many minor editorial changes, spelling, and other necessary

typographical corrections have been made.

Section 4.1b(a)—Effective Date of Variance Decisions

The AFL-CIO supported making decisions of substantial variance hearings effective on the date of issuance of an Administrative Law Judge's (ALJ) decision except where the decision results in the restoration of lost wages or fringe benefits, in which case the decision should be retroactive to the beginning of the contract, whereas DOD felt that a contractor should not be required to pay higher rates when a request for a variance hearing under section 4(c) of the Act has been made until the matter is resolved by an Administrative Law Judge. DOD also stated that a decision on substantial variance should not become effective until 10 days or more after the issuance of any new wage determination rather than the date of the ALJ's decision.

As set forth in § 4.163(c), the legislative history makes it clear that collectively bargained wages and fringe benefits must be honored "unless and until" they are found, after a hearing, to be at variance. Thus, the above suggestions cannot be adopted.

DOD also objected to the phrase "for the same location" as requiring successor contractors, regardless of where the service work will be performed, to pay wages and fringe benefits contained in a predecessor's collective bargaining agreement, and recommended using "at" or "in" the same location.

There is nothing in the Act indicating Congressional intent for such a strict limitation on section 4(c) of the Act. This point will be discussed in more detail under § 4.163.

Section 4.1b(b)—Limitations to the Applicability of Section 4(c) of the Act

The AFL-CIO, the Center to Protect Workers' Rights, and a number of other union organizations opposed what they perceived as additional limitations on the application of section 4(c) of the Act in the proposed adoption of different "cut off dates" for receipt of new or changed collective bargaining agreements in the case of negotiated procurements or contract extensions. The unions asserted that these proposed changes deprive workers of benefits which were insured by the 1972 Amendments to the Act.

The National Aeronautics and Space Administration, the Department of Energy, and several contractors argued that the rule for the application of new collective bargaining agreement rates in

subparagraph (b)(2) should be tied to receipt of proposals (or best and final proposals), and not to contract award or commencement.

The General Services Administration (GSA) and NASA argued that the "30 day rule" in subparagraph (b)(2) would disrupt the procurement process because there would be legitimate reasons for delaying contract commencement for more than 30 days beyond the award date.

The Army and Air Force Exchange Service (AAFES) recommended a 90 day rule instead of the 30 day rule proposed in (b)(2), in order to allow phase-in procedures, since 60-90 days typically elapse between their contract awards and the contract commencement dates.

The time frame change in § 4.1b(b)(2) essentially moves back the date for recognition of new collective bargaining agreements from the current 10 days prior to the contract commencement, in the case of negotiated procurements, options or extensions, to the date of award—provided that the contract commences within 30 days after the award and that the predecessor contractor and collective bargaining representatives of the predecessor's employees are notified of all applicable procurement action dates, including, for example, commencement of negotiations, date of award and commencement of the contract. Otherwise, the "10 day prior to the commencement" rule becomes operative. While it is recognized that this change may take away 20 days from potential collective bargaining, it is deemed fair and equitable for all concerned, given the possible disruptions to the procurement process by the current 10-day rule. Conversely, tying the effectiveness of new bargaining agreements to the date on which contract proposals are received or the date of contract option, or extending the 30-day period to 90 days as suggested by some agencies, would provide too serve a limitation on the time available for meaningful collective bargaining with an incumbent contractor. For example, receipt of proposals often occurs many months before contract award or commencement.

The Computer and Business Equipment Manufacturers Association (CBEMA) objected to the provision in subparagraph (b)(3) that the limitations on the application of section 4(c) of the Act contained in subparagraphs (b) (1) and (2), concerning new collective bargaining agreement rates, are dependent upon the contracting officer notifying the predecessor contractor and

the union of the applicable procurement dates.

This requirement, which has been in the Regulations since 1976, is necessary to give the affected parties fair and adequate notice, so that orderly bargaining may take place.

The Department of Defense recommended language changes in § 4.1b (b)(2) to refer to "contract start of performance" to prevent contractor evasion of the 30 day rule therein. This suggestion will be adopted.

Various commentators pointed out that in order to be effective, subparagraph (b)(3) must be clarified to specify that the incumbent contractor and the collective bargaining representative must be notified 30 days in advance of all applicable procurement dates. This subparagraph will be so clarified.

Section 4.4(a)—Notice of Intention To Make a Service Contract (SF-98)

The AFL-CIO; the Center to Protect Workers' Rights; the International Alliance of Theatrical Stage Employees, Local 780; the American Federation of Government Employees; and the International Brotherhood of Electrical Workers commented that the requirement for submitting SF-98s to the Department no less than 90 days prior to solicitation was necessary if DOL is to carry out its wage determination responsibilities more effectively, but suggested that the representatives of employees affected by the issuance of a wage determination (including Federal employees) also be notified.

The Department does not believe that the notification of employees' representatives that an SF-98 has been filed is a necessary or appropriate requirement. Employees are notified of their rights under the contract pursuant to § 4.6(e) in the contract clauses and union representatives are notified of agency procurement actions under § 4.1b (b)(3).

DOD and GSA objected to requiring earlier submissions of SF-98s for procurements which are not recurring and are not known of in advance. GSA noted that the reason for the longer advance time period was to accommodate appeals of wage determinations to the Board of Service Contract Appeals, and stated that it opposes, in spirit, the establishment of a Board because of the ensuing delays and complications which will accrue to the procurement process.

The National Aeronautics and Space Administration; the Department of Energy; the Department of Agriculture (Office of the Secretary, the Office of Operation and Finance, and the Forest

Service); the Naval Surface Weapons Center and the Chamber of Commerce also objected to the 90 day advance notice requirement as impairing the procurement process by increasing lead times for new requirements, thereby necessitating revisions of submitted data and an increase in costs. They argued that earlier submissions would also increase the incidence of changed collective bargaining agreements and would result in corresponding changes in wage determinations required by section 4(c) of the Act. NASA recommends retaining the current 30 day requirement and handling appeals which delay the issuance of a wage determination on a case by case basis.

As indicated above, the purpose of proposing an increase in the lead time for submission of SF-98s from 30 to 90 days was to provide adequate time for the review of wage determinations, if requested. (For the reasons stated in the preamble relating to 29 CFR Part 6, the Board of Service Contract Appeals is not being established, as proposed. Rather, a formal appeals procedure to the Secretary is being substituted.)

However, because of the degree of concern expressed by affected agencies, it has been decided to strike a balance by shortening this lead time to 60 days for submissions in the case of recurring, known procurements but retaining a 30 day submission period for unplanned and/or emergency actions. Appropriate changes will also be made in § 4.4(f).

GSA also took issue with the requirement in § 4.4(a) that agencies submit specific questions concerning the SCA's applicability to individual contracts to DOL, asserting that contracting officers, on advice of agency legal counsel, should retain authority to decide the applicability of the Service Contract Act in individual cases.

Since DOL has the responsibility for resolving questions of labor standards applicability (see the Opinion of the Attorney General, 43 Atty. Gen. Ops. (March 9, 1979)), it is proper to require the agencies to refer such matters for resolution.

Section 4.4(b)(1)

Two industry associations and one firm argued that the "5 employees" provision contained in this subsection should be interpreted as meaning 5 work years.

Because of the fluctuation in, and variety of staffing patterns on service contracts (e.g. a large number of employees used for a short time, a few used over the course of a year, etc.), it is not appropriate to establish any hard and fast rule on how to count the number of service employees, which is

used by DOL to determine whether a wage determination is mandatory pursuant to section 10 of the Act. In any event, as required by section 10 and as set forth in § 4.3, DOL intends to issue wage determinations wherever possible, irrespective of whether more or less than 5 service employees will be utilized on a contract.

Section 4.4(f)

The Department of Defense objected to the 90 day rule for submission of SF-98s, and recommended a 30 day submission requirement for nonroutine procurements because of the need to meet emergency situations on a timely basis.

Such accommodation will be made in this subsection, as discussed above under § 4.4(a).

DOD also objected to the requirement that the contracting agency not award a contract with more than 5 service employees without an appropriate wage determination on the grounds that the agency should not have to hold up the award if the Department had not issued a wage determination within a reasonable time.

As noted in this subsection, the requirement that all contracts which involve the use of more than 5 service employees contain a wage determination carries out the mandate in section 10 of the Act and thus cannot be varied. The Department will do its utmost to issue timely wage determinations in response to the timely submissions of SF-98s.

Section 4.4(g)

DOD suggested that the requirement to contact DOL if a solicitation is delayed more than 30 days beyond the date indicated on the SF-98 to determine whether a wage determination is still current be changed to 60 days, in an effort to lessen the potential for unnecessary delays and disruption of the contracting process.

This is a reasonable suggestion, and will be adopted.

The National Aeronautics and Space Administration suggested that an expiration date be set forth in the wage determination in lieu of requiring the contracting agency to contact DOL if the procurement date exceeds the 30 day limitation, which they state is a common occurrence.

Given the large volume of wage determinations issued and revisions made, this is not a viable alternative.

Section 4.5(a)(2)—Inclusion of Revised Wage Determinations

The AFL-CIO; the Center to Protect Workers' Rights; the International

Alliance of Theatrical Stage Employees, Local 780; the International Brotherhood of Electrical Workers; and the International Association of Machinists and Aerospace Workers objected to this provision as giving the contracting agencies too much discretion to use or reject revised wage determinations received less than 10 days prior to the date of bid opening in the case of competitive procurements, thereby inviting abuse. In addition, all of these parties recommend requiring the inclusion of an updated wage determination which is received by a contracting agency up to the date of contract commencement in the case of noncompetitive procurements.

NASA, the Army and Air Force Exchange Service (AAFES), the General Services Administration, the Department of Energy, the Computer and Business Equipment Manufacturers Association, and one contractor said the proposal would cause procurement problems by allowing insertion of wage determinations which were not contemplated in the original bidding competition. AAFES stated that a "90 day rule" for negotiated contracts would be preferable to the "30 day rule" proposed in this provision because of the nature of its contracts.

The Department of Defense suggested revising this subsection to substitute the term "contract start of performance" for "contract commencement." This change was adopted for the reasons set forth in § 4.1(b).

The time frames for insertion of revised wage determinations provided in this section establish a fair and reasonable balance between the competitive aspects of the procurement process and providing for current prevailing wages and fringe benefits which will apply over the ensuing contract term (in most cases, a whole year). The "10 day rule" in the case of competitive procurements has been in the Regulations since 1968. The "30 day rule" in this proposed section replaces the current policy of requiring the inclusion of revised wage determinations up to the date of contract commencement with respect to negotiated (or option) procurement actions. This prior policy led to some serious difficulties. In addition, the new proposal dovetails with § 4.1(b)(2) as it relates to revised collective bargaining agreements. No change will be made in this section other than the language changes proposed by DOD which are helpful.

Section 4.5(c)—Failure To File SF-98 on a Timely Basis; Erroneous Contracting Agency Determinations of Noncoverage

The Department of Defense (DOD) objected to the requirement that a contract agency either include the Service Contract Act provisions in a contract or cancel or terminate a contract, when DOD finds that the agency erroneously did not apply the Act to that contract. DOD believes that DOL should make allowances for good faith disagreements; it also contends that the court cases cited in this subsection do not indicate that DOL has the authority to require cancellation or termination of the contract.

The General Services Administration (GSA) opposed § 4.5(c)(2) on the ground that the potential for disruption of a contract far outweighs the "benefits" derived from the retroactive inclusion of the Service Contract Act in some situations. GSA argues that if the contract has been substantially performed, the decision whether to amend the contract should be left up to the contracting officer based upon the particular facts in the case, or at least, DOL should take this into consideration.

The Council of Defense and Space Industry Associations and the National Council of Technical Service Industries stated that the procedures in this section do not adequately protect the contractor by failing to require the contracting agency to reimburse the contractor for unanticipated costs.

The AFL-CIO, IATSE, the Center to Protect Workers' Rights, and the International Brotherhood of Electrical Workers all commented in favor of this section, stating that it would help insure the retroactive application of wage determinations to contracts where the agency has omitted the SCA requirements and would prevent employees from losing the protections of the Act.

In the case of a substantially completed contract, the Department of Labor has and will consider whether a contracting agency made a good faith decision not to include the required provisions of the Act in a particular contract and the possible disruptions to a procurement in deciding on remedies in each individual case. Accordingly, we do not believe that any changes in the regulation are justified.

The listed court cases are generally cases in which the courts have required incorporation of contract provisions required by law or considered such provisions to be incorporated as a matter of law. The Department of Labor does not have the authority to require an agency to reimburse a contractor for

additional costs resulting from the inclusion of a wage determination or for other related procurement costs. These are matters for resolution within the context of the applicable procurement statutes and regulations and GAO directives. This section of the regulations sets out various possible alternative avenues of relief for the contracting agencies to consider and/or adopt so as to provide for equity to contractors while at the same time properly effectuating the remedial purposes of the SCA.

Section 4.5(d)

NASA and GSA objected to the requirement that agencies call the Department for guidance when an SF-98 has been timely filed but no wage determination has been issued, stating that this imposes delays on the contracting agencies but does not impose similar time limits on the Department. Both parties suggested that when a wage determination is not issued the wage determination applicable to the previous contract should be used or, if there was not a previous determination, the minimum wage standards contained in section 6(a)(1) of the Fair Labor Standards Act should apply.

This subsection is intended to provide an efficient and simplified procedure for the agencies and DOL to use in order to implement the mandatory requirement in section 10 of the Act for the issuance and, obviously, the inclusion of current, prevailing wage determinations in contracts. The failure to include a wage determination or the use of outdated wage determinations would be improper. Finally, this provision conforms to the instructions currently set forth on the reverse side of the SF-98.

Section 4.6(b)(1)—Contract Clauses

The Department of Energy (DOE) noted that the last sentence in this subparagraph does not specify that the length of service of a service employee with a predecessor contractor (which is used in determining wage and fringe benefits entitlements) must also have been performed on a predecessor contract. This section will be so amended.

Pan American World Airways agreed that length of service should be considered for fringe benefit entitlement but not for wage entitlements. However, length of service must be considered where required, as discussed in Subpart D of this title.

Section 4.6(b)(2)—Conforming Procedures

The AFL-CIO, the Center to Protect Workers' Rights, IATSE, and the International Brotherhood of Electrical Workers fully supported the proposed detailed changes in the conforming procedures. They believe that requiring the participation of the affected workers and involving the Department will prevent abuses such as redesigning jobs to evade the established wage determination classes and rates.

The Department of Energy (DOE) objected to the conforming procedures as potentially causing continuous disputes given the multitude of possible job function and responsibility combinations, and objected to the requirement that the contractor explain the conformance to the affected employees.

The Department of Defense objected to the requirement for review of all conformance actions by the Department on the grounds that it places additional burdens on the contracting agency, adds delays and paperwork requirements, and encroaches on the contracting officer's authority.

NASA proposed that new and different conformances procedures be established for contract modifications, options or extensions, new contract awards where there is no predecessor, and awards through recompitation, based upon maintaining a constant arithmetic relationship between the rates for conformed classes and those listed on a wage determination. In all cases, however, it was proposed that only the contracting agency and the Department be involved in the conformance.

The Council of Defense and Space Industry Associations (CODSIA) objected to the requirement for Departmental approval of conformances as interference in the collective bargaining process and as increasing the administrative burden on the Department. CODSIA and NCTSI also objected to the proposed time limits for conformance, and to the placing of the burden for conformance on the contractor. If the contractor "guesses wrong", CODSIA contended, he is subsequently held liable for violations based on the failure to conform rates properly. The Scientific Apparatus Makers Association and a number of contractors made similar observations.

The Computer and Business Equipment Manufacturers Association (CBEMA) and some other commentators asserted that the conforming procedures require either individual bargaining with each employee, which was termed

impractical, or forced collective bargaining contrary to the National Labor Relations Act.

NCTSI also stated that conformance actions should be appealable to the Board of Service Contract Appeals, and that subsequent to the completion of final action, the Department should issue a revised wage determination containing the additional rates in order to reduce subsequent conformance burdens.

The Department has wrestled for many years with this complex problem of conforming wage rates and classifications for contract work for which no wage data is available or about which the Department has not been informed by the agency on the SF-98. The proposed revisions to this procedure are intended to spell out and clarify existing methods. While we believe that the procedure for agreement the interested parties should continue to include the affected employees or their representatives, we intend to study, for possible future use, other alternatives, like the one proposed by NASA. In the meantime, this proposed subsection will be adopted. Moreover, we intend to take administrative steps to issue, to the extent possible, wage rates for all of the occupational classifications requested by the agencies, utilizing statistically valid benchmarks, slotting of jobs, etc. It is also noted that conformance actions will be appealable.

With respect to the proposed DOL review of all conforming actions, this requirement is deemed necessary because of significant past abuses and/or failure to observe the contract conforming requirements, which led to serious, protracted compliance problems when discovered during the course of investigations. However, it will be our policy not to modify agreements reached by the interested parties unless they are determined to be clearly erroneous.

Section 4.6(g)—Recordkeeping

NASA recommended review of the proposed requirement that the contractor's records include the employee's social security number because of the possible impact of the Privacy Act of 1974.

Since this agency computes and disburses wages to employees and taxes to the IRS from withheld funds, this provision is in accord with the Privacy Act.

National Star Route Mail Carrier's Association argued that the suspension of contract payments to a contractor for failing to provide payroll records might be appropriate in cases involving willful withholding of records, but not in

situations where records were lost or simply not maintained.

This provision will be applied judiciously, with due regard for the facts in each case.

Section 4.6(i)—Withholding

NCTSI argued that contract fund withholding should be at the discretion of the contracting agency and should not take place in advance of due process hearings.

This policy on withholding is in accord with section 3(a) of the Act. See § 4.187(a) of this Part for an explanation of this matter.

Section 4.6(j)—Inclusion of Contract Clauses in Subcontracts

Several commenters suggested that the Department clarify the requirement that SCA clauses are only required to be inserted in subcontracts which are subject to the Service Contract Act.

Such amendatory language will be added.

Section 4.6(1)(2)—Seniority List

Several firms stated that the requirement to submit an employee seniority list to be used by successor contractors to determine vacation eligibility in certain cases was burdensome. The Computer and Business Equipment Manufacturers Association questioned whether this provision violated the Privacy Act and whether it was proper to require a firm to turn over business information to a competitor.

The National Council of Technical Service Industries (NCTSI) argued that the requirement to submit a list of employees during the last month of contract performance prior to the end of that month is impossible, since such a list could only be estimated at that time and requested this section be revised to require that the list be furnished within 30 days after completion of contract performance.

This proposal basically was made at the suggestion of a number of service contractors who had experienced difficulty in obtaining employee length of service data which is necessary in order for them to determine vacation entitlement amounts based on service with "predecessor" contractors where there is a succeeding contract (§ 4.173). This subsection will greatly assist successor contractors in obtaining this information and thus help insure greater voluntary compliance with the vacation fringe benefit provisions of the Act and wage determinations, as well as eliminating many serious and protracted enforcement problems in this area. NCTSI's suggestion would be

unenforceable on a predecessor contractor, since the contract would have been completed, and thus no further contractual remedy would be available. The subsection only requires turning over the seniority list as it exists at the time stated. No valid reason for not adopting this proposal has been advanced.

Section 4.6(m)—Contract Clause: Incorporation of SCA Rulings and Interpretations by Reference

NASA and the Xerox Corporation objected to inclusion by reference of all rulings and interpretations of Part 4. Xerox thought the contract clauses should stand alone.

Since all bidders and contractors must be governed by the same rules of compliance, it is appropriate that those rules be set forth as a contractual requirement. However, it is obviously not feasible or appropriate to include the entire regulation verbatim in the contract clauses. This provision, in substance, has been in the Regulations since 1968.

Section 4.6(n)—Certification of Eligibility

The AFL-CIO, the Center to Protect Workers' Rights, the Service Employees International Union, the International Association of Machinists and Aerospace Workers, and the International Brotherhood of Electrical Workers supported this provision as preventing fly-by-night contractors from obtaining further contracts after being debarred by merely changing their name or the name of their firm.

Several contractor associations (National Star Route Mail Carriers, CBEMA and NCTSI) objected to contractors being required to certify that each "official" is not debarred on the grounds that it is impossible to know whether each stockholder of a firm, including those with only minor investment, is on the debarred list.

This subsection does not require certification of eligibility with respect to every stockholder, but only those parties or officials with a "substantial interest" as set forth in Section 5 of the Act and as discussed in § 4.188(c).

Section 4.6(o)

The Department of Energy commented that the concept of formalized, approved programs for apprentices and trainees is almost foreign to the service industry and will force higher bids or no bids on Federal service contracts.

This section providing for enrollment in approved training programs in order to pay apprentices, student learners and handicapped workers less than the

applicable prevailing or minimum wage insures that bona fide training opportunities are present. It is our experience that there are many apprenticeship programs for workers in service occupations. This provision has been in the Regulations since 1968 and, to our knowledge, has caused no difficulties.

Section 4.6(p)—Apprenticeship and Training

The AFL-CIO, the Center to Protect Workers' Rights and the International Brotherhood of Electrical Workers generally supported the proposal as contributing to the upgrading and training of service workers but objected to the last sentence allowing "trainee" classifications to be included in wage determinations regardless of whether such "trainees" are enrolled in an approved program, claiming this would encourage contractors to underclassify service workers in order to justify the payment of lower wages. They suggested adding a requirement that trainee rates only be permitted when provided for in a bona fide apprenticeship program.

In response to these comments, we have deleted the last sentence of this section.

On the other hand, DOD, NASA, and the Northrop Corporation objected to trainee classifications being allowed only if included in the applicable wage determination on the grounds that many contractors use trainees and proposal's restrictive language would impair affirmative action and equal employment opportunity programs. DOD recommended that the same rules apply to both bona fide apprenticeship and training programs.

We have carefully considered the objections to this subsection. The Bureau of Apprenticeship and Training (and equivalent State agencies) approves apprenticeship programs for a wide variety of those service occupations which lend themselves to indentured skill progressions, and are open to any firm which desires a bona fide program and accommodates equal opportunity considerations. We therefore believe that this section as proposed (which retains the principles embodied in the regulations since 1968—see § 4.6(o)), does not restrict job opportunities in the service contract area, but through the registration/approval process for apprenticeship programs insures bona fide, meaningful training and provides protections necessary to prevent abuses of workers and unfair competitive bidding advantages.

Section 4.10—Substantial Variance Proceedings Under Section 4(c) of the Act

Several commentors, including the AFL-CIO, the Center to Protect Workers' Rights and the IBEW stated that the Act did not intend to require substantial variance proceedings based only on unsubstantiated claims, which cause unnecessary delay and expense. They recommended that this section be amended to require the charging party to present a *prima facie* case before a hearing is convened.

The provision in § 4.10(b)(2) requiring that a showing must be made that "there may be a substantial variance" is sufficient for the Department to eliminate frivolous complaints.

The IBEW and the Center to Protect Workers' Rights asserted that "interested parties" should include only the successor contractor, the contracting agency, and the affected employees or their collective bargaining representatives.

It is our view, however, that other prospective contractors and their representatives are clearly interested parties, and that they should be given the opportunity to participate in the process.

The Department of Defense objected to allowing the parties who are signatories to a bona fide collective bargaining agreement to challenge the agreement as being at variance.

As provided in § 4.10(b)(1), the signatories to a collective bargaining agreement are clearly interested parties under these proceedings, and there is nothing in the Act that indicates it would be inappropriate for them to request a hearing pursuant to this section.

Section 4.11—Arm's Length Proceedings

The AFL-CIO, the Center to Protect Workers' Rights, IATSE, and the IBEW all opposed the establishment of separate proceedings for substantial variance challenges and arm's length challenges. They commented that two separate procedures would result in repetitive litigation and unnecessary delay.

This section recognizes that these issues may, in fact, arise separately. However, where they are both present, §§ 4.10(c), 4.11(d) and Subpart E of 29 CFR Part 6 (§ 6.50) now provide for the consolidation of both issues in one proceeding. In addition, the time limits on requests for both types of hearings will preclude repetitive proceedings.

NASA recommended that other arrangements which would not meet the "arm's length negotiation" test be listed

in proposed § 4.11(a), and stated that the test should be the National Labor Relations Board's "good faith bargaining" standard based upon an analysis of all facts in a particular case.

This is an appropriate suggestion and will be adopted in principle. However, since the NLRB and not DOL is the controlling agency on this issue, the changes will reflect this fact.

Section 4.51(b)—Prevailing in the Locality Determinations—Determination of Prevailing Rates

Several commentors, including CBEMA, NCTSI, SAMA, NASA and several individual firms, suggested that wage determinations should contain entry level wage rates and provide for the payment of a range of rates to the various employees within a given classification. These commentors argued that the issuance of a single prevailing wage rate for each classification would disrupt "merit pay" practices within "high technology" industries.

On several prior occasions, the Department by itself and in conjunction with an inter-agency task force has considered the possibility of issuing a rate range type of wage determination. On each occasion the Department concluded that the rate range and similar proposals would be clearly contrary to the statutory scheme and, therefore, would require legislation before such action could be implemented. Although the Department may use various different methods to collect and analyze data for the issuance of wage determinations under the SCA, a basic principle of this Act, as well as the Davis-Bacon Act, is that the prevailing wage rate established for each particular classification is the minimum floor permitted to be paid to all employees working in that classification on the Government contract. Nothing in the legislative history of the Act nor in any of the numerous hearings conducted subsequent to the passage of the SCA suggests any Congressional intent to depart from the traditional interpretation that a single prevailing rate must be determined for each classification of workers. In fact, establishment of a wage determination with a rate range would have the practical result of issuing a minimum wage, and not a prevailing wage. This is clearly contrary to the law.

For a further discussion of the circumstances under which the Department issues wage determinations for different levels in an occupational classification, see § 4.152.

Section 4.51(c)—Prevailing in the Locality Determinations—"Due consideration"

The AFL-CIO, the Center to Protect Worker's Rights, and the American Federation of Government Employees objected to the discretion which this section affords the Secretary in giving "due consideration" in the issuance of SCA wage determinations and they suggest that there should be mandatory criteria for applying due consideration. The AFGE recommends that, at a minimum, the Department should give proportional weight to the compensation received by Federal employees when issuing prevailing wage determinations. NASA and the Scientific Apparatus Makers Association on the other hand do not agree that the legislative history indicates that Congress intended to narrow the gap between wages paid to Federal employees and to service employees under SCA.

Although the legislative history of the 1972 Amendments to the Service Contract Act does not specifically define the purpose of the "due consideration" requirements of section 2(a)(5) of the Act, the report of the House Representatives, which accompanied the bill to amend the act did cite a number of serious problems including "a substantial disparity in wages and benefits which has developed between Federal wage board employees and their counterparts employed by service contractors". The purpose of the "due consideration" requirement is more clearly stated in an April 1975 report of the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor entitled "Congressional Oversight Hearings: The Plight of the Service Worker Revisited".

In addition, the Department has previously considered implementation of a structured scheme for giving "due consideration". In many cases the Department gives due consideration in the manner suggested by AFGE; however, strict adherence to mandatory "due consideration" standards would serve to inhibit the exercise of even limited discretion, which is necessary to avoid anomalies in the wage determinations.

Therefore, no change in this section of the Regulation is warranted.

Section 4.53 Locality Basis of Wage and Fringe Benefit Determinations Where Place of Performance Is Unknown

Numerous commentors objected to the provision in proposed § 4.53(b) allowing the use of a large composite geographic

area as the locality basis for devising wage determinations when the place of performance is not known at the time of bid advertising or requests for proposals. Those objecting included the AFL-CIO, the Center to Protect Workers' Rights, IBEW, CODSIA, NCTSI, DOD, NASA, DOE, CSA and several corporations. Many of these commentors cited the decision of the U.S. Court of Appeals in *Southern Packaging and Storage Co., Inc. v. United States*, 618 F. 2d 1088 (4th Cir., 1980). Some agency and industry commentors suggested a "two-step" procurement process (i.e., step one would identify the localities of all potential bidders and step two would be the issuance of wage determinations for all potential places of performance for inclusion in the solicitation). Other suggestions included variations of the "two-step" process, using the locality of the incumbent contractor as the locality for all successors, and using the locality of the procuring agency or installation as the locality for the purpose of applying wage determinations. Some of the parties also objected to application of section 4(c) of the Act in situations where the location of the successor contractor is unknown at the time of bid solicitation.

While all of the comments on this section have been given careful review and consideration, none of the various suggestions has been sufficiently developed to allow immediate approval. For example, a formal "two-step" procurement process presents some practical administrative problems and would require concomitant changes in the procurement regulations. Accordingly, while the Department is continuing to give serious consideration to some variation of the "two-step" proposal, it would be premature to reach any final conclusion without further review and opportunity for public and agency comment. This proposed subsection is therefore, being deleted.

In the meantime, the Department is applying the principles set forth in *Southern Packaging* and is examining each procurement on an individual basis when the place of performance is unknown at the time of bid advertising to determine the appropriate locality or localities. This practice is reflected in the final regulation.

With respect to the application of section 4(c) to situations where the place of performance is unknown at the time of bid advertising, the clear language of the Act requires that the provisions of Section 4(c) apply to all successor contracts, regardless of place

of performance. This issue has been considered on numerous previous occasions including in Congressional oversight hearings in 1974 and 1975 and rulemaking hearings in 1975 and the proposal has been rejected as being contrary to the statute. This is further discussed in the analysis of comments regarding proposed § 4.163(i).

Section 4.55(a) Review and Reconsideration of Wage Determinations—Review by the Administrator

Comments were received from the AFL-CIO, AFGE, and others as to who should be considered "interested parties" with standing to request review of a wage determination by the Administrator. In essence, the commentors were seeking to avoid frivolous requests for review while at the same time being sure that all parties with a bona fide interest had the right to seek review by the Administrator. The Scientific Apparatus Makers Association (SAMA) suggested placing a burden on the petitioner to present a "prima facie" case before the Administrator would accept a request for review. In addition, some industry and agency commentors were concerned about the time frames applicable to requests for review and reconsideration. Some considered the time requirements too restrictive while others felt that additional time limits should be established to insure prompt, timely reviews by the Administrator.

Because a formal wage determination review procedure is being newly established under these Regulations, the Department has made every effort to insure that no interested party is excluded from the process. In the fifteen years since the statute was enacted, the Department has entertained numerous informal requests for reconsideration, but we have never attempted to preclude reconsideration based on the petitioning parties standing or interest in the matter. The Department's objective is the issuance of the most accurate wage determinations possible, and, in order to achieve that goal, we consider all pertinent evidence, regardless of its source. Accordingly, the Department does not support restricting the standing of any possible interested party. With respect to time frames, the Department endeavors to conduct a prompt and expeditious review process; however, since any review is dependent on other aspects of the wage determination process, the establishment of more specific time constraints in this section is not possible.

Section 4.55(b) Review by the Board of Service Contract Appeals

A number of labor organizations opposed the review of wage determinations by an appellate board. These comments will be discussed in conjunction with proposed Part 6 of this title.

Section 4.110 What Contracts Are Covered

The General Services Administration, the Council of Defense and Space Industry Associations, the Computer and Business Equipment Manufacturers Association, the Scientific Apparatus Makers Association, the National Council of Technical Service Industries, the McDonnell Douglas Corporation, the Bell and Howell Company, Xerox Corporation, and Datapoint Corporation objected to SCA coverage of separate bid specifications which are principally for the furnishing of services through the use of service employees, asserting that the "principal purpose" test for coverage under the Act can only be applied to contracts in their entirety. Several of these commentors noted similar objections to other sections of the proposed Regulations delineating SCA coverage of separate bid specifications, such as § 4.132. GSA contended that the term "(and any bid specification therefor)" in section 2(a) of the SCA merely refers to the documents in a solicitation for bids, rather than a separate line item or work requirement within a bid solicitation or a contract as interpreted in the proposed Regulations. Essentially following GSA's line of reasoning, Bell and Howell argued that the SCA should not be applied to GSA Federal Supply Service "schedule" contracts for the furnishing of equipment and what it termed "incidental" services to maintain and repair that equipment.

NCTSI commented that SCA coverage of separate specifications within a contract would create significant administrative problems because of the application of different labor standards obligations.

The legislative history of the SCA contains no definition nor discussion of the term "bid specification" in section 2(a) of the Act. In the absence of such guidance, the Department of Labor has had to interpret this term in the fashion determined to be most consistent with the statutory language and the remedial purposes of the Act. Following these precepts, the Department has held since 1966 that a contract containing a separate bid specification which is principally for the furnishing of services through the use of service employees is subject to the Act regardless of the

principal purpose of the other specifications of the contract as a whole. The Department's position that the SCA applies to a separate bid specification within a procurement which also calls for the furnishing of supplies is set forth in § 4.132 of the current Regulations. The position on SCA coverage of separate specifications is also explicitly stated in § 4.116(c) of the current Regulations, which codifies SCA coverage of service specifications in contracts which also contain separate specifications for construction work.

Sections 4.116(c) and 4.132 of the current Regulations were formally adopted in 1968 after being published as part of the proposed 29 CFR Part 4 with opportunity for comment. At that time, no procurement agency and only one association expressed objections to the application of the "principal purpose" test to separate service specifications. It should also be pointed out that the Department's position on specifications subject to differing labor standards is clearly reflected in section 12-1002.1 of the Defense Acquisition Regulation which controls Department of Defense procurement. DAR 12-106 and FPR 1-18.701-2 contain a discussion of similar principles.

SCA coverage of separate bid specifications does not extend to incidental services performed under contracts also calling for the furnishing of nonlabor items, but only to requirements calling for substantial and segregable amounts of services, thus avoiding any overlapping of labor standards protections. With respect to the comment by Bell and Howell, it should be pointed out that, according to figures supplied by GSA, the cost, for example, of services performed under maintenance specifications in combined lease/purchase and maintenance contracts for automatic data processing and related equipment alone amounts to several hundred million dollars per year. This volume of work can hardly be characterized as "incidental". To view contracts only in their entirety for the purpose of determining SCA coverage would remove much of the protections intended by the Act.

Accordingly, since no new arguments have been presented as to why this longstanding position should be reversed at this time, we do not believe it appropriate to change any of the provisions in this or other sections of the proposed Regulations delineating SCA coverage of separate bid specifications for services.

Section 4.111 Contracts "To Furnish Services"

The Council of Defense and Space Industry Associations, the Computer and Business Equipment Manufacturers Association, the National Council of Technical Service Industries, the Department of Defense, the Department of Energy, the National Aeronautics and Space Administration, the Rockwell International Corporation, the McDonnell Douglas Corporation, and the Trinidad Corporation all objected to the provision in proposed § 4.111(a) stating that the "principal purpose" test for coverage under the Act applies only in determining whether a contract (or bid specification) is principally for services. These commentors essentially asserted that the proper application of "principal purpose" is threefold: whether a contract is principally for services, is principally performed in the United States, and is principally performed through the use of service employees.

Under section 2(a) of the SCA, the Act applies to (e)very contract (and any bid specification therefor) * * * the principal purpose of which is to furnish services in the United States through the use of service employees." Since the legislative history does not specifically state how the principal purpose language of the Act should be applied, the Department had to decide what construction of the term was intended by the statutory scheme.

In enacting the SCA, Congress evidenced a clear intent to "close the gap" between labor standards protections already in place for workers on construction contracts and supply contracts under the Davis-Bacon Act and the Walsh-Healey Public Contracts Act. See § 4.111(b). The Department, starting in 1966, has adhered to the position that the "principal purpose" test is used only to determine whether a contract is principally for services as opposed to one for supplies or construction activity. Thus, if a contract in the United States is determined to be principally for the purpose of furnishing services, it is subject to the SCA if it is performed "through the use of service employees" as discussed in § 4.113.

No new reasons have been advanced to support a change in this longstanding position which has been set forth in the Regulations since 1966. Such a change would amount to a significant "roll back" in labor standards protections.

Section 4.112 Contracts To Furnish Services "In the United States"

The AFL-CIO and the Seafarers International Union, addressing the

issue of SCA coverage of contracts for services performed on marine vessels, stated that all United States flag vessels are considered United States territory wherever such vessels travel, and recommended that the Regulations be changed to provide coverage even when such vessels enter non-American waters. The AFL-CIO also recommended that the reference to the Outer Continental Shelf Lands Act be replaced with the tests of the Fishery Conservation and Management Act of 1976, which provides for a 200 mile limit.

The definition in section 8(d) of the statute regarding the geographic scope of the Act is explicit, expressly excluding any territory other than those specifically set forth therein. Also, the use of the Outer Continental Shelf Lands Act standard is specifically provided for in the statute. Accordingly, these suggestions cannot be adopted by regulation.

The Computer and Business Equipment Manufacturers Association, DOD, and one firm argued that services performed on a vessel must be principally performed in the United States to be covered by the Service Contract Act.

As discussed in the analysis of 4.110, we do not consider this objection to comport with the Act's principal purpose test.

Section 4.113(a)(2) Contracts To Furnish Services "Through the Use of Service Employees"

The AFL-CIO and the Center to Protect Workers' Rights noted their agreement with the language of § 4.113(a)(2) specifying that the SCA applies to contracts principally for the furnishing of services and under which service employees are used to a significant or substantial extent, terming this provision necessary to protect the rights of service employees and in keeping with the remedial purposes of the Act.

The Computer and Business Equipment Manufacturers Association, the Council of Defense and Space Industry Associations, the Chamber of Commerce, the Scientific Apparatus Makers Association, the General Services Administration, the Department of Defense, the National Aeronautics and Space Administration, and several companies objected to our application of the "principal purpose" test.

All contended that the Congressional intent was that services must be furnished principally by service employees, in order for the Act to apply.

The Department's position on the "principal purpose" test is fully

discussed in the analysis of comments under § 4.111. The language of this section has been revised, however, to make it clear that while the Act applies to any service contract in which there are any service employees performing contract work, the Department, under its authority to issue tolerances, does not require application of the Act to situations where the use of service employees is only a minor factor in the performance of the contract. Moreover, in response to comments by NASA and the Chamber of Commerce, we have added a new subparagraph (3)(ii) which sets forth the factors which the Department considers in determining whether the use of service employees is only a minor factor or is significant or substantial.

Numerous Federal agencies, business firms and associations, universities, and law firms objected to the statement in the second paragraph of § 4.113(a)(2) of the Regulations that under the principles discussed in this subsection many contracts for research and development (R & D) are subject to the Act. Those objecting included the Office of Science and Technology Policy of the Executive Office of the President; the Department of Agriculture; the Department of Housing and Urban Development; the Under Secretary of Defense for Research and Engineering; the National Science Foundation; NASA; CODSIA; NCTSI; the Chamber of Commerce; Booz-Allen and Hamilton; ITT Research Institute; the Rand Corporation; Digital Equipment Corporation; Planning Research Corporation; the National Association of College and University Business Officers; Harvard University; Yale University; John Hopkins University; Duke University; the University of Michigan; and the University of California.

Many of these commentors argued that the Department's assertion of SCA coverage of R & D contracts represents a new and unwarranted expansion of the Act's coverage.

In fact, as is clear from a comparison of the present and proposed Regulations, the principle of SCA coverage of R & D contracts has been stated in §§ 4.110-4.113, and in particular, § 4.113(a)(2), since 1968. With the exception of a few minor editorial changes, the current text of that subsection was carried over in total to the proposed § 4.113(a)(2). While a new subparagraph was added, it simply amplifies the principles already contained in the Regulations, and cites R&D as an example of a type of contract which has in the past been subject to the SCA where the usual tests of coverage have been met. Because it has been

clear to contracting agencies as well as to the Department of Labor that a large number of R & D contracts fall within any reasonable criteria for coverage by the SCA, many contracting agencies have requested wage determinations for them.

Indeed, R & D contracts are categorized under the DOD procurement regulations as service contracts (DAR 22-101(b)(xxii)). Even statistics compiled by the Office of Management and Budget (Federal Procurement Data System), which our evidence indicates are understated, indicate that 16.39 percent of contracts which have an "R & D" label contain these SCA provisions.

Several commentors also objected to SCA coverage of R & D contracts on the grounds that their principal purpose is the furnishing of research, not services, while others objected because R & D contracts often involve the furnishing of tangible end items such as a prototype, a set of specifications for a product, or a feasibility study in the form of a written report.

As discussed in § 4.111 of the proposed Regulations and the analysis of comments regarding that section, under the statutory scheme, virtually all types of Government contracts not specifically exempted may be subject to the labor standards provisions of the Davis-Bacon Act, and/or the Walsh-Healey Act and/or the Service Contract Act. It must be emphasized that coverage is independent of the designation, nomenclature or characterization of any particular contract under the procurement system of a contracting agency. Thus, while "R & D" is often only a budgetary designation which encompasses a very broad spectrum of contracts, the applicability of the SCA to R & D contracts—as well as to all other types of contracts—depends on whether or not the statutory tests for coverage have been met in each particular case. While numerous R & D contracts have been subject to the SCA because they meet the usual coverage tests for service contracts, SCA is not required to be applied to many other contracts categorized as "R & D" by the procurement agencies, either because service employees are a minor factor in their performance or because the contracts really involve the furnishing of goods or construction to the Government. Thus, for example, a contract to furnish prototypes of a new weapons system would not be covered under the SCA, but rather under the Walsh-Healey Act. Likewise, a contract to build a pilot coal gasification plant would be subject to the Davis-Bacon Act

rather than the SCA. However, as discussed in § 4.131 (a) and (e), the furnishing of such tangible items as written reports does not remove a contract for R & D or other services from the coverage of the SCA, as such items are considered to be of secondary importance to the services which it is the principal purpose of the contract to procure.

Several commentators, notably universities, objected to SCA coverage of R & D contracts for a variety of reasons relating to the belief that SCA wage determinations would cause severe disruptions in the pay systems of universities, some of which are established and controlled by State laws mandating pay levels for all university employees whether employed on Government contracts or not.

The Department recognizes that special problems of compliance with the terms of SCA wage determinations may arise when colleges and universities compete for Government contracts, and every effort will be made to develop wage determinations reflecting the pay practices of such institutions where appropriate.

Some firms commented that many R & D contracts are of the "cost-reimbursement" variety, under which contractors are compensated for all reasonable costs. Thus, it was argued, the SCA should not apply since R & D contractors have no incentive to engage in "wage busting" against service employees, and such employees do not need the protections of the Act.

The Department's position on this matter is that the presence or absence of "wage busting" is not an appropriate basis for determining coverage under the SCA. Adopting this criterion would cause severe administrative problems and require the Department to make arbitrary judgments concerning contractors' pay practices, which the statute does not authorize DOL to do, and the end result would be a patchwork of coverage.

Section 4.114 Subcontractors

The Council of Defense and Space Industry Associations, the Computer and Business Equipment Manufacturers Association, the Scientific Apparatus Makers Association, the National Council of Technical Service Industries, the Department of Energy, the National Aeronautics and Space Administration, and several firms objected to the provision in § 4.114(b) holding prime contractors jointly liable for SCA violations committed by their subcontractors. Some commentators argued that there was no statutory or

judicial basis for such a liability to be placed on the prime contractor.

The provision that the prime contractor is liable in the event its subcontractors fail to comply with the Act by breaching the contract clauses, has been in the regulations since their inception, and follows precedent under the Davis-Bacon and Walsh-Healey Acts. (See, for example, Decision of the Armed Services Board of Contract Appeals, *A. Jeris, Inc.*, 67-1 BCA par. 6241, March 22, 1967; Decision of the Comptroller General, B-162034, October 4, 1967; *JBL Construction Co. Inc.*, Decision of the Administrator, CCH Lab. L. Rep., *Wages Hours* par. 31,239 September 22, 1978; *Ernest Simpson d.b.a. Ernest Simpson Construction Co.*, Decision of the Administrative Law Judge, 23 WH cases 1064 (1978).)

The Act and the contract clauses require the prime contractor to agree that the prescribed labor standards will be observed with respect to all employees on the contract. Therefore, this is primarily a matter of contract law (privity of contract). Specifically, the principal enforcement remedy in section 3 of the law is the withholding of contract funds in the case of violation. The Government can only withhold funds from the prime contractor, not from a subcontractor. To change this essential policy could invite prime contractors to broker subcontracts to fly-by-night firms, thereby nullifying labor standards protections enforcement of the Act.

Section 4.115 Exemptions and Exceptions

Paragraph (b) of the proposed regulation has been deleted since this section only concerns statutory exemptions, and the Secretary's authority to issue exemptions and variances is discussed elsewhere in § 4.123; therefore this paragraph was deemed unnecessary.

Section 4.116 Contracts for Construction Activity

Local No. 3 of the International Union of Operating Engineers objected to the proposed removal from coverage of construction projects on Guam which are not subject to the Davis-Bacon Act because the geographic scope of the Act does not extend beyond the 50 states and the District of Columbia, asserting that the Department should continue to protect the rights of construction workers in Guam.

We carefully reviewed this matter as a result of questions previously raised, and concluded that it would not be in accord with the law to continue the regulatory policy of asserting that

construction contracts become subject to the Service Contract Act solely because such contracts are performed outside the geographic scope of the Davis-Bacon Act.

NASA and GSA objected to the discussion in proposed § 4.116(b) of contracts involving the demolition, removal, and sale of salvage materials as an example of a type of covered service contract not subject to the exemption in section 7(1) of the Act.

This position has been in the Regulations since 1968 and no convincing reasons have been advanced challenging its validity or propriety.

The Council of Defense and Space Industry Associations, the Computer and Business Equipment Manufacturers Association, and the McDonnell Douglas Corporation objected to § 4.116(c) which, in the case of a contract containing requirements for construction and nonconstruction work, limits the application of the exemption in section 7(1) of the Act to those separate specifications or segregable portions of the contract which call for the construction work, and thereby provides for SCA coverage of other contract requirements which are principally for services.

This position has been contained in these Regulations since 1968, as well as in both the Federal Procurement Regulations and the Defense Acquisition Regulations for many years. It also is in accord with the principles contained in §§ 4.110 and 4.132.

Section 4.123 Administrative Limitations, Variances, Tolerances, and Exemptions

The Computer and Business Equipment Manufacturers Association, the Scientific Apparatus Makers Association, and several individual firms recommended the adoption of an exemption for contracts for "commercial product support services". This request had already been submitted to the Department and is not being dealt with in the revision of this Regulation. Our position regarding coverage by the Act of such contracts is discussed under § 4.130.

Section 4.130 Types of Covered Service Contracts Illustrated

GSA objected to the listing of "computer services", as it may be construed to cover some activities arguably not subject to the Act. A large variety of "computer services" are covered by the Act where they are principally for services and involve the use of service employees, as discussed in sections 4.111 and 4.113. Furthermore, such contracts were specifically

mentioned as being covered in the President's statement upon signing the 1972 SCA amendments.

The Computer and Business Equipment Manufacturers Association, SAMA, and a firm contended that the Act should not apply to employees of firms which furnish "commercial product support services," both Government and private sector customers, either because the procurement is not principally for services or because the wage protections provided by the Act are not necessary since marketplace pressures maintain a relatively high level of wages.

The concepts of whether maintenance/repair services are performed on "commercially available" products or by firms which service both the Federal and private sectors are immaterial and irrelevant to SCA coverage.

There is no indication in the statute or the legislative history that contracts for "commercial product support services" are not covered. On the contrary, except for the specific exemptions in section 7, the Act by its express terms applies to "(e)very contract (and any bid specification therefor) . . . the principal purpose of which is to furnish services . . .". Further, the legislative history as discussed in § 4.111(b) also clearly indicates this all encompassing purpose and intent.

The law was enacted "to provide labor standards for the protection of employees of contractors and subcontractors furnishing services to or performing maintenance service for Federal agencies". Congress explained that service contracts were "the only remaining category of Federal contracts to which no labor standards protections apply." See S. Rep. 798, 89th Cong., 1st Sess. 1 (1965); H.R. Rep. No. 948, 89th Cong., 1st Sess. 1 (1965).

Following these guidelines, the Department has, since 1966, consistently held that the maintenance and repair of all types of equipment, including ADP equipment, scientific and medical apparatus, office and business machines, and "other high technology" equipment, are covered under the SCA, regardless of whether the equipment is commercially available.

Since almost all services are commercially offered or are in support of commercial products or equipment, from linen supply to automobile and vending machine servicing, any such exemption would, in effect, administratively nullify a significant portion of the Service Contract Act.

NCTSI and Northrop Corporation asserted that the addition of a number

of examples to the list represents a significant expansion of the Act's coverage, and includes contracts that are professionally oriented, especially subsection (a)(16), citing electronic equipment maintenance and operation (which is listed in the § 4.130(h) of the current Regulations) and engineering support services.

Such contracts, like other service contracts, are clearly subject to the Act if the criteria in §§ 4.111-4.113 are met, and many "professional" contracts listed are of the type contemplated by the 1972 and 1976 amendments to the Act. For example, during the House debate preceding passage of the 1976 amendments, the Chairman of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor explained that the purpose of those amendments was to clarify Congressional intent that the SCA applies to white collar employees, and specifically mentioned "clerical personnel, office machine operators, and persons engaged in data processing" as employees intended to be covered by the Act. See 122 Cong. Rec. 31575 (1976).

Section 4.131(f) Contracts Under Which the Contractor Receives Tangible Items from the Government in Return for Services—Timber Sales

A significant number of the comments received related to the application of the SCA to so-called "timber sales" contracts as discussed in this proposed subsection. Commentors included Members of Congress, forest industry associations, logging contractor associations, numerous lumber companies, labor organizations, the U.S. Departments of Agriculture and Interior, the Small Business Administration, the U.S. Navy, State and local government bodies, law firms, and individuals. The arguments regarding coverage of timber sales/removal contracts fell into several main categories, as follows:

It is argued that services provided under timber sales contracts are only incidental to the principal purpose of the contract which is the sale of timber by the Government. Some commentors cited the Organic Act of 1897 (16 U.S.C. section 475), which provided that "No national forest shall be established except to improve and protect the forest . . . and to furnish a continuous supply of timber for the use and necessities of citizens of the United States . . ." to support their argument.

The National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*, was also cited by the commentors, who asserted that this legislation (which details how national forests are to be managed) has as its main purpose the providing of

timber. Further, they stated that nowhere in this legislation was there a suggestion that timber sales contracts were predominantly service oriented or that Congress desired such sales to be included under the Service Contract Act.

The United Brotherhood of Carpenters and Joiners of America, arguing in support of coverage, stated that the National Forest Management Act of 1976 requires that the national forests be maintained by the Forest Service for multiple uses, i.e., "coordination of outdoor recreation, range, timber, watershed, wildlife and wilderness." (Section 6(e)1 of the National Forest Management Act of 1976, 16 U.S.C. 1604). They concluded that the sale of timber by the Forest Service is not undertaken primarily to dispose of Government property, but as part of an overall forest management program.

The Chairman of the Subcommittee on Labor-Management Relations, House Committee on Education and Labor, the Washington State Labor Council (AFL-CIO), the International Woodworkers of America, and the Contract Loggers Association commented in favor of the application of the Act to timber sales. These commentors argued that coverage was necessary to protect the wages and fringe benefits of the forest products industry employees.

It appears that the difficulty is with the terminology "timber sales." Although § 4.116(b) of the existing regulations, promulgated in 1968, sets forth the Department's position that contracts for timber clearing are subject to SCA, proposed §§ 4.130 and 4.131(f) stated for the first time the Department's longstanding interpretation that timber sales contracts *per se* are covered.

In determining the application of the SCA, it is necessary to examine the substance of a contract and its underlying purpose. Thus, as provided in the existing regulations as well as the regulations herein at §§ 4.131 and 4.141, the form of the contract and the fact that a contractor pays the Government under the terms of the contract do not control SCA coverage.

The Department has thoroughly reviewed the various statutes relating to the National Forests, the legislative histories, the regulations and handbooks issued thereunder, sample, timber sales contracts, and related material, in conjunction with the comments.

After this analysis, it is the Department's conclusion that certain contracts for timber sales (as distinguished from service specifications thereunder, discussed below) would not be principally for services and therefore would not be subject to the Act. On the other hand, under contracts styled as

"timber sales" contracts, trees are frequently removed for the purpose of opening up the forest for public use, such as camping; for construction projects, such as roads or reservoirs (covered by the Davis-Bacon Act); because the trees suffer from insect infestations or have been damaged by disasters such as forest fires or volcanic eruptions; or for other forest management purposes. The Department has determined that under such contracts (when not subject to the Davis-Bacon Act), the principal purpose is the furnishing of services, and the contracts are subject to SCA.

It is also apparent from our review of the contracts, that those timber sales contracts which are not principally for services, generally do contain a number of specifications principally for services. These specifications include, for example, the building of temporary roads, firefighting and control, erosion control, slash removal and trimming, and the removal of diseased or injured trees. Pursuant to § 4.132, such specifications are subject to SCA.

In addition to the comments concerning coverage of timber sales contracts, many commentators, including the forest products associations, objected to the recordkeeping requirements which they contend the application of the Act would impose upon the timber products industry, especially with respect to small companies. However, the SCA does not require maintenance of records beyond those already required under the Fair Labor Standards Act (which is applicable to most firms), except that if an employee receives less than the rate on the applicable wage determination for hours spent on commercial work not subject to the Service Contract Act, the employer's records must be segregated to show separately the time spent on contract work. Thus, in the Department's view, no excessive recordkeeping burden exists because of SCA coverage.

Most industry commentators also alleged that the application of SCA to timber sales would be highly inflationary. Wage determinations issued pursuant to the Act only reflect the wages and fringe benefits found to be prevailing in the locality, i.e., those wages and fringe benefits found to be most predominant in the area where the contract work is performed. The Department of Labor knows of no unique features of the timber products industry which would cause the Service Contract Act to have any significant impact upon it.

The National Forest Products Association and several logging

companies commented that bonding requirements would be increased by application of the Act, thereby having a harmful effect, especially upon small contractors. However, neither the Service Contract Act nor these regulations require bonding.

Accordingly, § 4.131(f) has been revised to clarify the circumstances in which SCA applies to timber sales contracts.

Section 4.133 Beneficiary of Contract Services

As a result of comments regarding the scope of the contracts which are not subject to the SCA under this provision, the Department issued a new proposal on this section for comment. A final regulation is anticipated in the near future.

Section 4.134 Contracts Outside the Act's Coverage

The General Services Administration (GSA) objected to the provision in § 4.134(b) of the proposed Regulations denoting SCA coverage of service requirements contained in contracts for the lease of building space under certain circumstances. GSA contended that this provision would be contrary to the position expressed in an exchange between Solicitor of Labor Donahue and Senator Prouty during the 1965 Congressional hearings which led to enactment of the SCA, and would have a significant impact on the ability of GSA's Public Building Services to continue leasing building space in its present manner.

We do not agree with GSA's objections. Nothing in the exchange between the then Solicitor and Senator Prouty dealt with specifications in a contract which specifically require certain levels and frequencies of janitorial or other services. Moreover, janitorial workers are among the types of workers to whom Congress specifically intended the Act would apply.

Section 4.152 Employees Subject to Prevailing Compensation Provisions

The National Council or Technical Service Industries, NASA, and the Northrop Corporation commented that position descriptions are seldom attached to wage determinations, and recommended that DOL actually do so in all cases.

The Department will endeavor to supply position descriptions where necessary to inform users of the scope of duties included in a classification. However, as noted in the proposed § 4.152(b), this is not needed for some

classifications where the title and duties have commonly understood meanings.

With respect to proposed § 4.152(c), NCTSI, the Scientific Apparatus Makers Association, the Council of Defense and Space Industry Associations, NASA, McDonnell Douglas Corporation, and Northrop asserted that contractors should be allowed to establish lower level classifications, variously described as entry level, trainee, or intermediate level, if no such classifications are listed on an applicable wage determination. Several of these commentators claimed that the prohibition against the use of such lower classifications hampers equal employment opportunity and affirmative action efforts, and is contrary to industry practice.

It would not be appropriate nor in accord with the law to change our longstanding position and adopt any of the recommendations regarding the establishment of lower level subclassifications. Basic to prevailing wage statutes is the principle that the prevailing wage rate be the *minimum* permitted to be paid to *all* covered employees in the classification on the Government contract. There is no indication of any intent by Congress to apply any other principle in the SCA. If Congress had intended anything different, it would have so provided, as it did in the Walsh-Healey Act, which requires that the Secretary determine "the prevailing minimum wages for persons employed on similar work." Thus, House Report No. 948, 89th Cong., 1st Sess. (1965), accompanying the bill as enacted in 1965, states at page 3: "Service employees must be paid no less than the rate determined by the Secretary of Labor to be prevailing in the locality" (emphasis added). See also S. Rep. No. 798, 89th Cong., 1st Sess. 2 (1965).

Congress was certainly aware that in the thirty years in which the Department of Labor had been issuing wage determinations under the Davis-Bacon Act, the Department had been interpreting that Act as requiring that a single prevailing rate be determined for each classification of workers. The legislative hearings prior to enactment of the SCA in 1965 clearly indicate that the Department would follow Davis-Bacon principles in administering the SCA wage determination functions. In addition, during the numerous oversight hearings conducted subsequent to passage of the Act, Congress has never suggested that the Department of Labor's procedures for determining prevailing rates are contrary to its intent.

Obviously, all contractors have their own individual and differing pay

structures, no one of which would usually be prevailing in a locality. However, the language of section 2(a) of the Act makes it absolutely clear that all service employees performing the duties of a given classification must be paid at least the prevailing wages and fringe benefits listed for that class on the wage determination. Further, a lower rate of pay for such employees cannot be established through the conforming procedures in § 4.6(b)(2) of the Regulations, as those procedures can only be used where the duties of an unlisted class constitute a separate and distinct job category. Appropriate variations have been provided in § 4.6(o) for apprentices, student learners and handicapped workers. Moreover, as discussed in § 4.152(c), a wage determination will list a series of classes within a job classification family (e.g., Technician Classes A, B, and C) where the practice prevails in the industry and where bona fide differences in the work performed exist. In such situations, the lowest level listed is considered to be the entry level and the establishment of a lower level (or intermediate levels) through conformance or otherwise is not permissible. To allow individual contractors to arbitrarily "carve out" any number of subclassifications without restriction in these situations would subvert the statutory intent of the Act to provide prevailing labor standards protections for all service employees (nonminority and minority) and to remove wages as a factor in the competitive procurement process. Indeed, to adopt these suggestions would make any wage determination meaningless and in effect nullify the prevailing wage provisions of the Act. The prohibition against "carving out" subclassifications under the SCA has been upheld in numerous administrative proceedings. See *Triple B Builders, Inc.*, Case No. SCA-974, Decision of the Assistant Secretary, March 28, 1970; *Fischer and Associates Technical Consultants, Inc.*, Case No. SCA-862, Decision of the Administrator, August 18, 1978; *Collins Radio Company, et al.*, Case No. SCA-430, May 27, 1976.

Section 4.163(a) Section 4(c) of the Act

The Service Employees International Union, IATSE, the AFL-CIO, the Center to Protect Workers Rights, and the IBEW objected to limiting the obligation of a successor contractor to the wage and fringe benefit provisions of the predecessor contractor's collective bargaining agreement because items excluded under this proposed subsection, such as work rules, and overtime premiums and other economic benefits, are negotiable under collective

bargaining pursuant to the National Labor Relations Act. These commentators argued that Congress did not intend to narrowly limit the meaning of wages and fringe benefits under section 4(c) of the SCA so as to exclude these negotiable items, and that successor contractors should be required to observe such provisions called for under the predecessor's collective bargaining agreement.

As set forth in section 2(a)(2) of the Act, only the types of benefits enumerated therein and benefits of a similar nature are considered bona fide fringe benefits for purposes of meeting the compensation requirements of that section as well as the successorship provisions of section 4(c) of the Act. (A discussion of the criteria which must be met in order for any fringe benefit to be considered "bona fide" is contained in § 4.171.) While it is recognized that there are other bona fide fringe benefits, it is clear from section 2(a)(2) that items such as seniority, work rules, guaranteed workweek, overtime premiums, and other collectively bargained provisions of an economic or noneconomic nature which are not of the type enumerated in section 2(a)(2) are not wages or fringe benefits for purposes of the Act. See *Trinity Services, Inc. v. Marshall*, 593 F.2d 1250 (1978). The fact that such items may be negotiated pursuant to the National Labor Relations Act is not material in determining the obligations of successor contractors under section 4(c) of the SCA. Daily or weekly premium overtime compensation benefits are provided by other statutes. (See §§ 4.180 and 4.181.) Accordingly, no change will be made in this section.

Section 4.163(b)

The Department of Energy (DOE), GSA, and NASA commented that this subsection should delineate who is a successor contractor under section 4(c) of the Act and recommended that the traditional National Labor Relations Board tests for determining who is a successor contractor be adopted.

In the 1972 amendments to the Act, Congress carved out a special definition for "successorship" in SCA contracts as a result of the decision in *N.L.R.B. v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), which makes the NLRB definition irrelevant here.

The Computer and Business Equipment Manufacturers Association (CBEMA), the Scientific Apparatus Makers Association (SAMA), and Technicolor Graphic Services, Inc., all objected to section 4(c) obligations being deemed self-executing. SAMA and Technicolor commented that it is the Department of Labor's responsibility to

issue determinations specifying the wage and fringe benefit obligations of successor contractors pursuant to section 4(c), and that unless the wages and fringe benefits contained in the predecessor contractor's collective bargaining agreement are reflected in a wage determination issued for the new contract, the successor contractor should not be obligated to pay them.

The statutory language of section 4(c) makes it clear that its provisions are self-executing whether or not all of the wage and fringe benefit requirements of a contractor's collective bargaining agreement are reflected in the wage determination issued for the successor contract. While the Department issues wage determinations for successor contracts accurately reflecting, to the extent possible, all of the wage and fringe benefit requirements, an occasional failure to do so (generally because the necessary data has not been furnished to the Department) cannot eliminate the successor contractor's statutory obligations under section 4(c) of the Act. A footnote notifying all bidders of their obligations in this regard is contained in all wage determinations issued pursuant to section 4(c). Accordingly, no change in this subsection would be appropriate.

Section 4.163(c)

The American Bar Association (ABA) and Rockwell International Corporation objected to the principle that decisions that collectively bargained wage rates and/or fringe benefits are substantially at variance with those prevailing in the locality are not made effective retroactively to the beginning of a contract.

The National Council of Technical Service Industries contended that if a variance proceeding is held, the difference in wages at issue should be held in escrow pending a decision on the matter.

The discussion of the legislative history of the 1972 amendments to the Act in this subsection makes it clear that collectively bargained wages and fringe benefits payable under section 4(c) of the Act must be honored "unless and until" a finding of substantial variance is made. Thus, variance hearing decisions cannot be applied retroactively, nor can an amount of wages or fringe benefits in dispute be held in escrow pending such a decision. However, every effort will be made to insure that variance decisions are rendered on a timely basis, in accordance with the time frames set forth in Regulations, Part 6.

Section 4.163(d)

The Department of Defense took issue with the requirement that sections 2(a) and 4(c) of the SCA must be read in conjunction, contending that the language of section 2(a) of the SCA provides that where a successor contractor has a bona fide collective bargaining agreement at his or her own plant, the contractor can pay employees in accordance with that agreement and be in compliance with the Act without having to observe the terms of a predecessor contractor's collective bargaining agreement pursuant to section 4(c) of the Act.

The legislative history of the 1972 amendments to the SCA, which added both section 2(a) and section 4(c) to the Act, makes it absolutely clear that sections 2(a) and 4(c) must be read in conjunction with each other, and the DOD interpretation on this point is in error.

Section 4.163(e)

The Department of Defense disagreed with the provision in this subsection that a contractor may succeed itself for purposes of the application of section 4(c) of the Act in noncompetitive situations (i.e., contract options or extensions), as well as in cases involving the recompetition of a contract. DOD claimed that, in noncompetitive situations, a contractor will have an incentive to increase collectively bargained wages and fringe benefits when it knows the agency will reimburse the costs of such an increase.

The legislative history of the 1972 amendments and the Act itself contemplate that collectively bargained wages and fringe benefits may increase over time, and such increases should be honored. To adopt DOD's restrictive suggestion would freeze wages for a number of years in the case of multi-year contracts. Section 4(d) of the Act precludes such a result. The "substantial variance" provisions of section 4(c) serve to preclude any abuses of the type foreseen by DOD.

Section 4.163(g)

The General Services Administration, the Department of Energy, and the National Aeronautics and Space Administration objected to the breadth of the provision requiring the payment of wages and fringe benefits provided for in a predecessor contractor's collective bargaining agreement pursuant to section 4(c) of the Act in the case of contract reconfigurations, claiming that in some situations the follow-on-contract may not be subject to the Act, e.g., in the case of a minor use

of service employees in a contract for professional services. In effect, it was claimed, the term "identifiable contract work" as used in this subsection narrows the scope of the concept of a successor contract under 4(c) of the Act from one in which substantially the same services are furnished to one in which any single class of service work previously furnished is rendered under the reconfigured contract.

The Department of Defense recommended that a variance or exemption be provided for reconfiguration situations where two contracts are combined and, as a result, two employees working side by side may perform identical work but receive two different rates of pay.

A successor contract must meet the general tests of SCA coverage set forth in section 2(a) of the Act before the provisions of section 4(c) can be applied. Thus, section 4(c) only applies to identifiable portions of a successor contract which is otherwise subject to the Act. The contracting agency must, in the first instance, make a good faith determination as to what constitutes "identifiable contract work", which, it is assumed, would involve more than one class of service employees in the usual case. Furthermore, our experience has shown that "substantially the same services" are furnished in a continuing, reconfigured succeeding contract. The interpretation in question is necessary to prevent contractual reconfigurations from being used to evade or defeat the remedial purposes of section 4(c). It thus would not be appropriate to grant a variation as recommended by DOD.

The National Council of Technical Service Industries argued that the provisions of this subsection create administrative difficulties as the successor contractor would not, it was claimed, receive notification of its wage obligations.

In actual practice, where contract reconfigurations are involved, successor contractors receive notification of their obligations under section 4(c) of the Act through the issuance of appropriate wage determinations by the Department. It should also be noted that the provisions of this subsection have been implemented for several years as a matter of policy, and we are not aware of its having resulted in any administrative difficulties such as those foreseen by NCTSI. Accordingly, no substantive changes will be made in this subsection.

Section 4.163(i)

The American Bar Association, the Council of Defense and Space Industry Associations, the Computer and

Business Equipment Manufacturer's Association, the National Council of Technical Service Industries, the Department of Defense, the Department of Energy, the National Aeronautics and Space Administration and Southern Packaging and Storage Co., Inc. objected to the application of section 4(c) of the SCA to successor contractors irrespective of the place of performance by the successor contractor.

Most of these commentators stated that Congress did not intend section 4(c) to apply where there was a change in the place of contract performance between the predecessor and successor contracts, while DOD asserted that section 4(c) should not apply to any contract performed at the contractor's plant (as opposed to a Government facility). Several of these commentators also claimed that this provision would necessitate numerous variance hearings caused by the conflict between "imported" collectively bargained wage rates and wage rates prevailing at the location of the successor contractor, and noted that variance hearings were not intended to correct problems caused by substantial differences between wage rates in different geographic locations.

The attorney for Southern Packaging and Storage Co., Inc. stated that this provision will prevent contractors in low wage areas from bidding on contracts currently performed in high wage areas pursuant to a collective bargaining agreement.

The language of section 4(c) of the SCA contains no provisions restricting its applicability to contracts performed at a Government facility generally or only to those procurements where the location of the successor contractor's place of performance is the same as the predecessor's. No such restriction is contained in the current Regulations, the relevant portions of which were promulgated in 1972.

Proposed revisions to 29 CFR Part 4 published for comment in April 1975, if adopted, would have limited the application of section 4(c) to those successor contracts performed at the same location as the predecessor contract. Subsequent to this proposal, oversight hearings were held by the House Subcommittee on Labor-Management Relations and public hearings were held by the Department of Labor. Congress specifically repudiated such a limitation, noting that:

The GAO has advanced an interpretation of section 4(c) that it is to be applied only where the same employees and same locality continue under a succeeding contract. * * * The subcommittee rejects this interpretation of section 4(c). No such qualification exists on the face of the statute and nothing in the

legislative history would support the restrictive GAO reading of the successor obligations of section 4(c). (House Subcommittee on Labor-Management Relations, Committee on Education and Labor, *Congressional Oversight Hearings: The Plight of the Service Worker Revisited*, 94th Cong., 1st Sess. 7 [Comm. Print, 1975]).

In those hearings, Congressional intent as to the proper issuance of wage determinations pursuant to section 4(c) of the Act was stated as follows:

" * * * Section 4(c) requires that the wages and fringe benefits, including prospective increases contained in a predecessor's collective bargaining contract, form the basis for the Secretary's determination for successor contracts whether performed at the same site or at a different site. (*Oversight Hearings*, p. 10).

On the basis of those hearings, during which the statute and its legislative history were carefully reviewed, it was decided to withdraw this proposed limitation.

Section 4.163(j)

The DOE objected to the requirement that a successor contractor is obligated to observe the wage rates and fringe benefit provisions of the predecessor contractor's collective bargaining agreement which the Department of Labor failed to include in an applicable wage determination.

As discussed in § 4.163(b), the provisions of section 4(c) of the SCA are self-executing, and thus, the occasional omission of a wage or fringe benefit provision contained in the predecessor contractor's collective bargaining agreement from the wage determination issued for a successor contract cannot relieve the successor contractor of the direct statutory obligation under section 4(c) to observe such provisions.

The National Council of Technical Service Industries and DOE asserted that to follow the requirement that any interpretation of the wage and fringe benefit provisions of the predecessor contractor's collective bargaining agreement must be based on the intent of the parties to that agreement would be difficult. They remarked that intent may not be expressed in the agreement and the parties to the agreement may not be available to provide explanation.

In the majority of cases, the intent of the parties to a predecessor contractor's collective bargaining agreement is clear from the language of the agreement, the wage and fringe benefit provisions thereof are accurately reflected in the wage determination attached to the successor contract, and the successor contractor can rely upon the body of interpretations contained in this subpart. However, in those rare

instances where the intent or meaning of a wage or fringe benefit provision in a predecessor contractor's collective bargaining agreement cannot be determined by a successor contractor, the Department of Labor will assist in obtaining interpretative guidance from the parties to that agreement.

Section 4.165 Wage Payments and Fringe Benefits—in General

The National Council of Technical Service Industries, the Computer and Business Equipment Manufacturers Association (CBEMA), and the Scientific Apparatus Makers Association (SAMA) objected to the provision in § 4.165(b) setting a semi-monthly pay period as the longest allowable under the SCA. SAMA stated that this provision may cause problems because many firms calculate fringe benefits on a monthly basis. CBEMA asserted that a requirement to obtain employee approval of a bi-weekly or semi-monthly pay period would contravene section 7 of the National Labor Relations Act by mandating collective bargaining.

The proposal in this subsection to reduce the longest permissible pay period under the Act from monthly to semi-monthly is deemed necessary to insure timely payment of wages to service employees, who are often low paid and do not have the financial resources to cover expenses incurred over an entire month in which they receive no wage payments without suffering undue hardships. This change is also necessary for effective enforcement of the Act to protect against those situations where contractors receive their final payment from the contracting agency before the last payroll comes due and fail to meet that payroll. However, as there may be individual cases where a showing can be made that a monthly payroll period is necessary and can be implemented without adversely affecting the employees, the Administrator will give consideration to specific requests for a waiver from this provision in order to allow a monthly pay period.

This proposed requirement will not restrict a contractor's ability to make fringe benefit contributions to bona fide plans on a monthly basis, as believed by SAMA. As set forth in § 4.175(d)(1), such contributions may be made on any periodic basis which is not less often than quarterly. While we do not believe that employee approval of a bi-weekly or semi-monthly pay period would contravene the National Labor Relations Act we have determined upon further study that it would be appropriate to withdraw the employee approval provision from the final rule and replace

it with a provision requiring contractors only to advise employees when such pay periods are used.

The Department of Defense and NCTSI opposed the requirement in § 4.165(c) to pay wage rates contained in an applicable wage determination which are higher than the rates contained in the contractor's collective bargaining agreement.

As discussed in § 4.163(d), an incumbent (successor) contractor may not adhere to the terms of its own collective bargaining agreement where they conflict with the terms of an otherwise applicable prevailing wage determination.

Section 4.169 Wage Payments—Work Subject to Different Rates

The Northrop Corporation argued that lower skilled employees should be allowed to be assigned to work in more highly skilled and highly paid job classifications for training purposes. Northrop recommended that recognition of what was termed a "long established practice" be made by establishing a tolerance allowing a service employee to work in a more highly skilled job classification up to 25 percent of the time without having to be paid the higher wage determination rate for such time.

Section 2(a) of the Act makes it clear that the various classes of service employees must be paid at least the established corresponding wage determination rates while performing on a covered contract. It follows from this statutory language and the general principle under the Act that the duties which an employee actually performs govern the rate(s) of pay to which he or she is entitled, and that where a single employee performs work in more than one classification, he or she must be paid at least the corresponding wage determination rate for the time spent performing in each classification. To grant the tolerance suggested by Northrop would be clearly contrary to the statutory intent to protect prevailing wages by allowing contractors to pay less than the applicable wage determination rate for substantial periods of time. Accordingly, no change will be made in this section, which has been in the Regulations since 1968.

Section 4.170 Furnishing fringe benefits or equivalents

The Bell & Howell Company and Editorial Experts, Inc. commented that the Department should not prohibit the cross-crediting of wages and fringe benefits in proposed § 4.170(a).

The statutory language of section 2(a) of the Service Contract Act

differentiates between payments for wages and payments for fringe benefits and does not provide for the cross-crediting of one against another. Consequently, since 1968, the Regulations have prohibited such cross-crediting. However, section 2(a)(2) of the Act and § 4.170(a) of both the current and proposed Regulations provide that contractors may discharge their obligation to furnish specified fringe benefits by making equivalent or differential payments in cash to employees.

Section 4.171 "Bona Fide" Fringe Benefits

The AFL-CIO commented that the definition of a bona fide fringe benefit as provided in this section is too restrictive, asserting that it should not exclude such benefits as supplemental unemployment plans and prepaid legal plans.

While not specifically enumerated in this section, supplemental unemployment plans and prepaid legal plans are considered "bona fide" fringe benefits for purposes of the Act.

The Computer and Business Equipment Manufacturers Association and Pan American World Airways, Inc. commented in opposition to § 4.171(a)(5), which requires that bona fide fringe benefit plans comply with section 401(a) of the Internal Revenue Code. CBEMA stated that section 401(a) of the tax code only relates to stock bonus, pension, and profit sharing plans, and addresses only the tax consequences of employer contributions to such plans, and not whether they provide benefits of value to employees.

Since section 401(a) of the Internal Revenue Code only covers certain types of fringe benefit plans, only plans of the types listed in section 401(a) must meet the requirements of that section. The final rule has been amended accordingly.

CODSIA, CBEMA, and NASA objected to the exclusion in § 4.171(b) of self-insured benefit plans from the definition of bona fide fringe benefits. They commented that many self-insured plans satisfy the requirements of the Employment Retirement Income Security Act of 1974. Rockwell International Corporation, Xerox Corporation, Pan American World Airways, Inc., and Frank B. Hall Consulting Company made similar comments.

The purpose of § 4.171(b) is to preclude those situations (e.g., as in unfunded plans) where monies allegedly allocated by a contractor to provide fringe benefits may be used for other purposes or may be recouped without

actually furnishing any benefits. The Department does not intend to prohibit self-insured plans where irrevocable payments are made pursuant to a trust or other funded arrangement and the other conditions of § 4.171 are met. The final Regulations have been amended to clarify this point.

Section 4.173 Meeting Requirements for Vacation Fringe Benefits

The Computer and Business Equipment Manufacturers Association (CBEMA) and Datapoint Corporation took issue with the requirement in § 4.173(a)(1) to consider prior service with a predecessor contractor(s) in computing vacation benefits on the grounds that prior service is often difficult to determine.

Vacation eligibility is often accrued on the basis of length of service with an employer. However, service employees on many Government contracts, who typically perform work at a single Federal facility for several years, in many cases could not gain vacation eligibility with any single employer since employing contractors frequently change, often on an annual basis. In recognition of this characteristic, the Regulations have since 1968 required that service employees receive credit for prior service with a predecessor contractor(s) at the same facility in order to insure that the employees actually receive the prevailing vacation benefits. In addition, as discussed in § 4.173(a), it is necessary to credit employees for prior contract service in order to avoid placing the incumbent contractor at a competitive disadvantage by making it, but not other bidders, liable for vacation benefits based upon length of prior service in performing the contract work.

Subsection 4.6(l)(2) of the Regulations requires that the incumbent contractor provide the contracting officer with a list of all the contractor's employees on the payroll during the last month of contract performance and their anniversary dates. This should eliminate problems in gathering length of service data.

CBEMA asserted that this requirement should not apply in the case of "commercial product support services" on the grounds that such services are generally not performed by "successor" contractors as that term is used under the Act and the Regulations.

The requirement to consider prior service with a predecessor contractor(s) in determining vacation eligibility does not generally apply to contractors furnishing so-called "commercial product support services" under General Services Administration-Federal Supply

Service "schedule" contracts because it is almost impossible to trace or identify any specific contract work requirements from a "predecessor" to a "successor" contractor.

The AFL-CIO, the American Federation of Government Employees, and NASA opposed the provision in § 4.173(a)(3) excluding prior service as a Federal employee from being counted toward an employee's eligibility for vacation benefits under the SCA. They argued that this policy discriminates against Federal employees whose jobs are contracted out and is contrary to Federal policy and intent as outlined in OMB Circular A-76.

Employees' prior service on a predecessor service contract must be considered by a successor contractor in determining vacation eligibility under this subsection. Since Federal employees have not worked on prior service contracts, prior service as a Federal employee need not be considered for this purpose. We do not believe that this provision discourages contractors from hiring former Federal employees whose jobs are contracted out.

NASA, commenting on § 4.173(b)(1), stated that DOL should establish criteria for determining what constitutes a break in service for purposes of eligibility for vacation benefits. Northrop Corporation and NASA requested clarification of the term "temporary layoff" in § 4.173(b)(2). Northrop also sought clarification as to whether a firm's administrative policy or collective bargaining agreement in this area is controlling.

As discussed in § 4.173(b), whether or not there is a break in service is dependent upon all the facts in a particular case, the primary factor being the reason(s) for an employee's absence from work rather than the length of that absence. It would not be practicable to establish more detailed criteria as to what constitutes a break in service or list every possible factual circumstance under which a break would or would not have occurred. Accordingly, the general guidelines and specific examples contained in § 4.173(b)(1) are considered to be sufficient guidance and no amendment is made to the regulation. Questions regarding continuous service for vacation eligibility should be referred to the Department for a determination. In all such cases, the rulings and interpretations of the Department contained in this subpart or issued in accordance with § 4.101(g) of the Regulations will take precedence over a contractor's own administrative policy or collective bargaining agreement. However, where a successor contractor is subject to the wage and

fringe benefit provisions of the predecessor contractor's collective bargaining agreement pursuant to section 4(c) of the Act, the terms of that agreement pertaining to fringe benefit entitlement, including those relating to continuous service for vacation eligibility, are binding upon the successor contractor as provided in § 4.163(j) of the Regulations.

The AFL-CIO and NCTSI commented that the vesting of vacation benefits and the liability therefor should be prorated for portions of years worked, in accordance with what they termed the prevailing practice in private industry and the Federal Government, rather than being based solely on an employee's anniversary date of employment as required under §§ 4.173(c) and (d)(1).

Most SCA wage determinations have provided for employee vesting of vacation fringe benefits and contractor liability therefor on the basis of employee anniversary dates since the Act's inception and have not provided for prorating either vesting or liability. This policy was adopted by the Department after careful consideration of the alternatives and in view of the characteristics of Government service procurement relating to employee length of service and contractor turnover, as discussed above. Under this scheme, employees who continue to provide the same contract services are assured of receiving their full vacation benefits annually without regard to any change in contractors. This longstanding policy does not provide a windfall or burden for either predecessor or successor contractors, since in most cases the vacation liabilities of both predecessors and contractors even out over time by the random distribution of employee anniversary dates. Although the preamble to the proposed Regulations invited comments on the possible adoption of an accrual (or pro rata) method for providing vacation benefits, no viable plan for doing so has been presented. Accordingly, the current policy will be maintained.

Section 4.174 Meeting Requirements for Holiday Fringe Benefits

The Department of Defense objected to the provision in § 4.174(a)(1) that an employee is entitled to holiday pay if the employee performs any work during the workweek in which a named holiday occurs. DOD recommended that the section be revised to provide for payment of holiday pay only if the employee works the day before and the day after the holiday.

NASA, DOE, CBEMA, and Datapoint Corporation objected to the requirement

in § 4.174(b) which provides for the payment of holiday pay to an employee who is hired during the first week of a contract but does not begin work until after the named holiday. This requirement is a limited exception to the general rule that the contractor is not required to compensate a newly hired employee for a holiday occurring prior to hiring of the employee.

CBEMA, DOD and Datapoint objected to the requirement in § 4.174(c)(4) for payment of holiday pay to an employee who works during the holiday workweek but terminates prior to the named holiday.

Because a contractor has the right to assign work in any way it deems appropriate to meet the requirements of the contract, there is the potential for a contractor to avoid the requirements of paying benefits for holidays listed in a wage determination by manipulating work schedules. Thus, the Department has for many years followed the policy which is now codified. An employee is entitled to holiday pay if the employee performs any work during the workweek in which a named holiday occurs, in order to prevent the contractor from gerrymandering work days in order to avoid the payment of holiday fringe benefits to employees. This rule avoids the problems of having to determine whether an employee voluntarily quit or was fired, voluntarily took off the day before or the day after the holiday or was directed to take off by the contractor, etc. The experience of the Department in administering the law has been that the longstanding policies set forth in § 4.174 are equitable and fair to contractors and to the rights of employees.

The requirement in § 4.174(b) to provide benefits for a holiday occurring during the first week of a contract to employees hired during that week but not until after the named holiday is necessary to insure that employees receive their full entitlement to holiday benefits. This specific requirement is also necessary to prevent incumbent contractors who retain their current workforce from being placed at a competitive disadvantage with respect to other prospective contractors who would be newly hiring employees during the first week of a contract. No substantive changes will be made in this section.

Section 4.175 Meeting Requirements for Health, Welfare, and/or Pension Benefits

The Council of Defense and Space Industry Associations, Northrop Corporation, McDonnell Douglas Corporation, and the Seafarers

International Union commented that the requirement in § 4.175(a)(2) to make differential payments where a contractor is able to obtain a specified fringe benefit for less than the amount stated on an applicable wage determination eliminates any incentive to obtain the benefit at a lower cost by, for example, negotiating lower premiums with an insurance carrier. Essentially, these commentators recommended that the standard by which compliance with fringe benefit obligations should be measured should be the level of benefits provided, rather than the monetary costs incurred.

As set forth in §§ 4.170 and 4.171 of the current Regulations, the Department has consistently required that fringe benefit compliance be measured by the monetary cost incurred by the contractor in furnishing such benefits. Compliance with fringe benefit requirements on the basis of the level of benefits provided is not practical because of the impossibility of measuring the relative merits and value to individual employees of the multitude of fringe benefit plans, which typically contain substantial variations in the types and amounts of benefits provided. The statutory provision in section 2(a)(2) allowing contractors to substitute equivalent fringe benefits and cash payments in lieu of the benefits specified in an applicable wage determination would preclude adoption of a level of benefits standard. No one has developed a feasible method for determining what fringes are prevailing in terms of the level of benefits provided. Thus, there is no means of informing contractors as to how they would comply with a requirement to furnish such benefits. Even if contractors could be so advised, if a given contractor desired a pension plan rather than a health insurance plan, it would be impossible to determine if the level of benefits were equivalent, and thus there would be no way to determine compliance with the Act.

CBEMA expressed concern over the requirement in § 4.175(c) that employees who are excluded from a plan must receive equivalent fringe benefits. In the view of the Department this provision is required by the statutory scheme under which each worker must be paid the prescribed minimum wage and furnished the prescribed fringe benefit or its equivalent. The fringe benefits are stated on the wage determinations as either a specified amount of payments or, in appropriate circumstances, in terms of average cost (see subsection 4.175(b)).

Section 4.187 Recovery of Underpayments

The Datapoint Corporation and the National Star Route Mail Carriers' Association asserted that the definition of "party responsible" in § 4.187(e) could result in imposing personal liability on most management and administrative officials of contractors.

The criteria for determining who is a "party responsible" as set forth in this section are based upon the authoritative administrative and judicial precedents cited therein. These criteria do not necessarily include most officials of a firm found to be in violation, but rather are limited to those who are responsible for controlling the firm, administering the contract or the firm's employment policies or are otherwise responsible for the violations by causing or permitting them to occur.

The Department of Defense (DOD) and the National Council of Technical Service Industries questioned whether the Department's procedures pertaining to disputes regarding violations of the Act in § 4.187(f) may be in conflict with the requirements of the Contract Disputes Act of 1978.

Section 14 of the Contract Disputes Act of 1978 sets forth the specific amendments made by the Congress to existing statutes. Significantly, no change, repeal or amendment, or reference was made to the SCA. Furthermore, Section 6(a) of the Contract Disputes Act states in part that "the authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine" (emphasis supplied). Therefore, DOL's explicit and exclusive statutory authority to resolve disputes set forth in section 4 of the SCA is unchanged.

In addition, logic dictates that the authority to resolve labor disputes should more properly reside in the agency which has, in addition to the statutory enforcement authority, the prerequisite expertise in administering the law and the regulations necessary to insure the effective and consistent implementation of such labor standards provisions.

This rule was drafted under the supervision and direction of Donald Elisburg, Assistant Secretary of Labor, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210. (202-523-6191).

Accordingly, 29 CFR Part 4 is revised as set forth below.

Signed at Washington, D.C., this 12th day of January 1981.

Donald Elisburg,

Assistant Secretary of Labor, Employment Standards Administration.

PART 4—LABOR STANDARDS FOR FEDERAL SERVICE CONTRACTS

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Authority: 41 U.S.C. 351, et seq.; 70 Stat. 1034, as amended in 86 Stat. 789, 90 Stat. 2358; 41 U.S.C. 38 and 39; and 5 U.S.C. 301.

Subpart A—Service Contract Labor Standards Provisions and Procedures

§ 4.1 Purpose and scope.

This part contains the Department of Labor's rules relating to the administration of the McNamara-O'Hara Service Contract Act of 1965, as amended, referred to hereinafter as the Act. Rules of practice for administrative proceedings under the Act and for the review of wage determinations are contained in Part 6 of this chapter. See Part 1925 of this title for the safety and health standards applicable under the Service Contract Act.

§ 4.1a Definitions and use of terms.

As used in this part, unless otherwise indicated by the context—

(a) "Act," "Service Contract Act," "McNamara-O'Hara Act," or "Service Contract Act of 1965" shall mean the Service Contract Act of 1965 as amended by Public Law 92-473, 86 Stat. 789, effective October 9, 1972, Pub. L. 93-57, 87 Stat. 140, effective July 8, 1973, and Pub. L. 94-489, 90 Stat. 2358, effective October 13, 1976 and any subsequent amendments thereto.

(b) "Secretary" includes the Secretary of Labor, the Assistant Secretary of Labor for Employment Standards, and their authorized representatives.

(c) "Administrator" means the Administrator of the Wage and Hour Division, or the authorized representative as set forth in this part. In the absence of the Wage-Hour Administrator, the Deputy Administrator of the Wage and Hour Division is designated to act for the Administrator under this part. Except as otherwise provided in this part, the Assistant Administrator for Government Contract Wage Standards is the authorized representative of the Administrator for the performance of functions relating to the making of wage determinations and the enforcement of the Service Contract Act of 1965, as amended, and this part.

(d) "Office of Government Contract Wage Standards" or "OGCWS" means the organizational unit in the Wage and Hour Division, Employment Standards Administration, to which is assigned the performance of functions of the Secretary under the Service Contract Act of 1965 as amended.

(e) "Contract" includes any contract subject wholly or in part to provisions of the Service Contract Act of 1965 as amended, and any bid specification or subcontract of any tier thereunder. (See §§ 4.107-4.134.)

(f) "Contractor" includes a subcontractor whose subcontract is subject to provisions of the Act. Also, the term "employer" means, and is used interchangeably with, the terms "contractor" and "subcontractor" in various sections in this part. The U.S. Government, its agencies, and instrumentalities are not contractors, subcontractors, employers or joint employers for purposes of compliance with the provisions of the Act.

(g) "Affiliate" or "affiliated person" includes a spouse, child, parent, or other close relative of the contractor or subcontractor; a partner or officer of the contractor or subcontractor; a corporation closely connected with a contractor or subcontractor as a parent, subsidiary, or otherwise; and an officer

or agent of such corporation. An affiliation is also deemed to exist where, directly or indirectly, one business concern or individual controls or has the power to control the other or where a third party controls or has the power to control both.

(h) "Wage determination" includes any determination of minimum wage rates or fringe benefits made pursuant to the provisions of sections 2(a) and 4(c) of the Act for application to the employment in a locality of any class or classes of service employees in the performance of any contract in excess of \$2,500 which is subject to the provisions of the Service Contract Act of 1965.

§ 4.1b Payment of minimum compensation based on collectively bargained wage rates and fringe benefits applicable to employment under predecessor contract.

(a) Section 4(c) of the Service Contract Act of 1965 as amended provides special minimum wage and fringe benefit requirements applicable to every contractor and subcontractor under a contract which succeeds a contract subject to the Act and under which substantially the same services as under the predecessor contract are furnished for the same location. Section 4(c) provides that no such contractor or subcontractor shall pay any service employee employed on the contract work less than the wages and fringe benefits provided for in a collective bargaining agreement as a result of arms-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for in such collective bargaining agreement. If, however, the Secretary finds after a hearing in accordance with the regulations set forth in § 4.10 of this subpart and Part 6 of this title that in any of the foregoing circumstances such wages and fringe benefits are substantially at variance with those which prevail for service of a character similar in the locality, those wages and/or fringe benefits in such collective bargaining agreement which are found to be substantially at variance shall not apply, and a new wage determination shall be issued.

If the contract has been awarded and work begun prior to a finding that the wages and/or fringe benefits in a collective bargaining agreement are substantially at variance with those prevailing in the locality, the payment obligation of such contractor or subcontractor with respect to the wages and fringe benefits contained in the new

wage determination shall be applicable as of the date of the Administrative Law Judges' decision. (See also § 4.163(c).)

(b) Pursuant to section 4(b) of the Act, the application of section 4(c) is made subject to the following variation in the circumstances and under the conditions described: The wage rates and fringe benefits provided for in any collective bargaining agreement applicable to the performance of work under the predecessor contract which is consummated during the period of performance of such contract shall not be effective for purposes of the successor contract under the provisions of section 4(c) of the Act or under any wage determination implementing such section issued pursuant to section 2(a) of the Act, if—

(1) In the case of a successor contract for which bids have been invited by formal advertising, notice of the terms of such new or changed collective bargaining agreement is received by the contracting agency less than 10 days before the date set for opening of bids, provided that the contracting agency finds that there is not reasonable time still available to notify bidders; or

(2) Notice of the terms of a new or changed collective bargaining agreement is received by the agency after award of a successor contract to be entered into pursuant to negotiations or as a result of the execution of a renewal option or an extension of the initial contract term, provided that the contract start of performance is within 30 days of such award or renewal option or extension. If the contract does not specify a start of performance date which is within 30 days from the award, and/or performance of such procurement does not commence within this 30-day period, any notice of the terms of a new or changed collective bargaining agreement received by the agency not less than 10 days before commencement of the contract will be effective for purposes of the successor contract under section 4(c); and

(3) The limitations in paragraph (b) (1) or (2) of this section shall apply only if the contracting officer has given both the incumbent (predecessor) contractor and his employees' collective bargaining representative written notification at least 30 days in advance of all applicable estimated procurement dates, including issue of bid solicitation, bid opening, date of award, commencement of negotiations, receipt of proposals, or the commencement date of a contract resulting from a negotiation, option, or extension, as the case may be.

§ 4.2 Payment of minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act of 1938 under all service contracts.

Section 2(b)(1) of the Service Contract Act of 1965 provides in effect that, regardless of contract amount, no contractor or subcontractor performing work under any Federal contract the principal purpose of which is to furnish services through the use of service employees shall pay any of his employees engaged in such work less than the minimum wage specified in section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (\$2.65 per hour beginning January 1, 1978, \$2.90 per hour beginning January 1, 1979, \$3.10 per hour beginning January 1, 1980, and \$3.35 per hour after December 31, 1980).

§ 4.3 Wage determinations.

(a) The minimum monetary wages and fringe benefits for service employees which the Act requires to be specified in contracts and bid specifications subject to section 2(a) thereof will be set forth in wage determinations issued by the Administrator. Wage determinations shall be issued as soon as administratively feasible for all contracts subject to section 2(a) of the Act, and will be issued for all contracts entered into under which more than 5 service employees are to be employed.

(b) Such wage determinations will set forth for the various classes of service employees to be employed in furnishing services under such contracts in the appropriate localities, minimum monetary wage rates to be paid and minimum fringe benefits to be furnished them during the periods when they are engaged in the performance of such contracts, including, where appropriate under the Act, provisions for adjustments in such minimum rates and benefits to be placed in effect under such contracts at specified future times. The wage rates and fringe benefits set forth in such wage determinations shall be determined in accordance with the provisions of sections 2(a)(1), (2), and (5), 4(c) and 4(d) of the Act from those prevailing in the locality for such employees, with due consideration of the rates that would be paid for direct Federal employment of any classes of such employees whose wages, if federally employed, would be determined as provided in 5 U.S.C. 5341 or 5 U.S.C. 5332, or from pertinent collective bargaining agreements with respect to the implementation of section 4(c). The wage rates and fringe benefits so determined for any class of service employees to be engaged in furnishing covered contract services in a locality

shall be made applicable by contract to all service employees of such class employed to perform such services in the locality under any contract subject to section 2(a) of the Act which is entered into thereafter and before such determination has been rendered obsolete by a withdrawal, modification, or superseding.

(c) Wage determinations will be available for public inspection during business hours at the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, and copies will be made available on request at Regional Offices of the Wage and Hour Division.

§ 4.4 Notice of intention to make a service contract.

(a) For any contract exceeding \$2,500 which may be subject to the Act, the contracting agency shall file with the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, Department of Labor, its notice of intention to make a service contract. With respect to recurring or known requirements, such notices shall be filed not less than 60 days (nor more than 120 days, except with the approval of the Wage and Hour Division) prior to (1) any invitation for bids, (2) request for proposals, (3) commencement of negotiations, (4) exercise of option or contract extension, (5) annual anniversary date of a multi-year contract subject to annual fiscal appropriations of the Congress, or (6) each bi-annual anniversary date of a multi-year contract not subject to such annual appropriations, if so authorized by the Wage and Hour Division. (See § 4.4(d).) Notices with regard to solicitations where such planning is not feasible shall be submitted as soon as possible, but not later than 30 days prior to the above contracting actions. Such notice shall be submitted on Standard Form 98, Notice of Intention to Make a Service Contract, and Standard Form 98-A or a statement containing the information in paragraph (b) of this section and shall be completed in accordance with the instruction provided and shall be supplemented by the information required under paragraphs (c) and (d) of this section. Supplies of Standard Forms 98 and 98-A are available in all GSA supply depots under stock numbers 7540-926-8972 and 7540-118-1008, respectively. If there exists any question or doubt as to the possible application of the Act to a particular procurement, the contracting agency shall submit such question in a

timely manner to the Administrator for determination.

(b) The contracting agency shall file with its Notice of Intention to Make a Service Contract (SF-98) either a Standard Form 98-A or a statement in writing, containing the following information concerning the service employees expected by the agency to be employed by the contractor and any subcontractors in performing the contract:

(1) The number of such employees of all classes, or a statement indicating whether such number will or will not exceed 5, the number for which the inclusion of a wage determination in the contract is mandatory under the provisions of section 10 of the Act as set forth in § 4.3(a); and

(2) A listing of those classes of service employees expected to be employed under the contract which, if employed by the agency, would be subject to the wage provisions of 5 U.S.C. 5341 or 5 U.S.C. 5332, together with a specification of the rates of wages and fringe benefits that would be paid by the Government to employees of each such class if such statute were applicable to them. (Under section 2(a)(5) of the Act and § 4.6 the inclusion of such a statement in the service contract is also required.)

(c) If the services to be furnished under the proposed contract will be substantially the same as services being furnished for the same location by an incumbent contractor whose contract the proposed contract will succeed, and if such incumbent contractor is furnishing such services through the use of service employees whose wage rates and fringe benefits are the subject of one or more collective bargaining agreements, the contracting agency shall file with its Notice of Intention to Make a Service Contract (SF-98) a copy of each such collective bargaining agreement together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under such agreement. If such services are being furnished for more than one location and the collectively bargained wage rates and fringe benefits are different for different locations or do not apply for one or more locations, the agency shall identify the locations to which such agreements have application. If the collective bargaining agreement does not apply to all service employees under the contract, the agency shall identify the employees and/or work subject to the collective bargaining agreement. In the event that the agency has reason to believe that any such collective bargaining agreement was not entered into as a result of arm's-length

negotiations, a full statement of the facts so indicating shall be transmitted with the copy of such agreement. See § 4.11. If the agency has information indicating that any such collectively bargained wage rates and fringe benefits are substantially at variance with those prevailing for services of a similar character in the locality, the agency shall so advise the Office of Government Contract Wage Standards and, if it believes a hearing thereon pursuant to section 4(c) of the Act is warranted, shall file its request for such hearing pursuant to § 4.10 at the time of filing the Notice of Intention to Make a Service Contract (Form SF-98).

(d) If the proposed contract is for a multi-year period subject to other than annual appropriations, the contracting agency shall file with its Standard Form 98 a statement in writing concerning the type of funding and the contemplated term of the proposed contract. Unless otherwise advised by the Wage and Hour Division that a Standard Form 98 must be filed on the annual anniversary date, a new Standard Form 98 shall be submitted on each bi-annual and anniversary date of the proposed multi-year contract in the event its term is for a period in excess of two years.

(e) Any Standard Form 98 submitted by a contracting agency without the information required under paragraphs (b), (c), or (d) of this section will be returned to the agency for further action.

(f) If exceptional circumstances prevent the filing of the notice of intention and supplemental information required by this section on a date at least 60 days (or 30 days in the case of unplanned procurements) prior to any invitation for bids, request for proposals, or commencement of negotiations, the notice shall be submitted to the Office of Government Contract Wage Standards as soon as practicable with a detailed explanation of the special circumstances which prevented timely submission. In the event the proposed contract involves performance by more than 5 service employees and an emergency situation requires an immediate award, the contracting agency shall contact the Office of Government Contract Wage Standards, Wage and Hour Division, by telephone for guidance prior to any such award. In no event may a contract subject to the act on which more than 5 service employees are contemplated to be employed be awarded without an appropriate wage determination. (Section 10 of the Act.)

(g) If any invitation for bids, request for proposals, bid opening, or commencement of negotiations for a proposed contract for which a wage determination was provided in response

to a Standard Form 98 has been delayed, for whatever reason, more than 60 days from the date of such procurement action as on the submitted Standard Form 98, the contracting agency shall contact the Office of Government Contract Wage Standards, Wage and Hour Division, for the purpose of determining whether the wage determination issued pursuant to the initial submission is still current. Any revision of a wage determination received by the contracting agency as a result of such communication or upon discovery by the Department of Labor of a delay, shall supersede and replace the earlier response as the wage determination applicable to such procurement, subject to the time frames set forth in § 4.5(a)(2).

§ 4.5 Contract specification of determined minimum wages and fringe benefits.

(a) Any contract in excess of \$2,500 shall contain an attachment specifying the minimum wages and fringe benefits for service employees to be employed thereunder, as determined in the applicable currently effective wage determination, including the applicable wage determination contained in any document referred to in paragraphs (a) (1) or (2) of this section;

(1) Any communication from the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, Department of Labor, responsive to the notice required by § 4.4; or

(2) Any revision of a wage determination issued prior to the award of the contract or contracts which specifies minimum wage rates or fringe benefits for classes of service employees whose wages or fringe benefits were not previously covered by wage determinations, or which changes previously determined minimum wage rates and fringe benefits for service employees employed on covered contracts in the locality. However, revisions received by the Federal agency later than 10 days before the opening of bids, in the case of contracts entered into pursuant to competitive bidding procedures, shall not be effective if the Federal agency finds that there is not a reasonable time still available to notify bidders of the revision. In the case of procurements entered into pursuant to negotiations (or in the case of the execution of an option or an extension of the initial contract term), revisions received by the agency after award (or execution of an option or extension of term, as the case may be) of the contract shall not be effective provided that the contract start of performance is within 30 days of such

award (or execution of an option or extension of term). If the contract does not specify a start of performance date which is within 30 days from the award, and/or if performance of such procurement does not commence within this 30-day period, the Department of Labor shall be notified and any notice of a revision received by the agency not less than 10 days before commencement of the contract shall be effective. In situations arising under section 4(c) of the Act, the provisions in § 4.1b(b) apply.

(b)(1) The following exemption from the compensation requirements of section 2(a) of the Act applies, subject to the limitations set forth in paragraphs (b) (2), (3), and (4) of this section: To avoid serious impairment of the conduct of Government business it has been found necessary and proper to provide exemption from the determined wage and fringe benefits section of the Act (section 2(a) (1), (2)) but not the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended (section 2(b) of this Act), of contracts under which five or less service employees are to be employed, and for which no such wage or fringe benefit determination has been issued;

(2) The exemption provided in paragraph (b)(1) of this section, which was adopted pursuant to section 4(b) of the Act prior to its amendment by Public Law 92-473, does not extend to undetermined wages or fringe benefits in contracts for which one or more, but not all, classes of service employees are the subject of an applicable wage determination. The procedure for determination of wage rates and fringe benefits for any classes of service employees engaged in performing such contracts whose wages and fringe benefits are not specified in the applicable wage determination is set forth in § 4.6(b).

(3) The exemption provided in paragraph (b)(1) of this section does not exempt any contract from the application of the provisions of section 4(c) of the Act as amended, concerning successor contracts.

(c)(1) If the notice of intention required by § 4.4 is not filed with the required supporting documents within the time provided in such section, the contracting agency shall, through the exercise of any and all of its power and authority that may be needed (including, where necessary, its authority to negotiate, its authority to pay any necessary additional costs, and its authority under any provision of the contract authorizing changes), include in the contract any wage determinations

communicated to it by the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, within 30 days of the receipt of such wage determination(s).

(2) Where the Department of Labor discovers and determines, whether before or subsequent to a contract award, that a contracting agency made an erroneous determination that the Service Contract Act did not apply to a particular procurement and/or failed to include an appropriate wage determination in a covered contract, the contracting agency, within 30 days of notification by the Department of Labor, shall include in the contract the stipulations contained in § 4.6 and any applicable wage determination issued by the Administrator or his authorized representative through the exercise of any and all authority that may be needed (including, where necessary, its authority to negotiate or amend, its authority to pay any necessary additional costs, and its authority under any contract provision authorizing changes, cancellation, and termination). (*G. L. Christian & Associates v. U.S.*, 312 F. 2d 418 (Ct. Cl. 1963), rearg. denied 320 F. 2d 345, cert. denied 375 U.S. 954; (53 Comp. Gen. 412, (1973); *Curtiss-Wright Corp. v. McLucas*, 381 F. Supp. 657 (D NJ 1974); *Marine Engineers Beneficial Assn., District 2 v. Military Sealift Command*, 86 CCH Labor Cases ¶33,782 (D DC 1979); *Brinks, Inc. v. Board of Governors of the Federal Reserve System*, 466 F. Supp. 112 (D DC 1979), 466 F. Supp. 116 (D DC 1979). (See also 32 CFR 1-403.)

(d) In cases where the contracting agency has filed its SF-98 within the time limits discussed in § 4.4(a) and has not received a response from the Department of Labor, the contracting agency shall, with respect to any contract for which section 10 of the Act and § 4.3 of this Part mandate the inclusion of an applicable wage determination, contact the Office of Government Contract Wage Standards, Wage and Hour Division by telephone for guidance.

§ 4.6 Labor standards clauses for Federal service contracts exceeding \$2,500.

The clauses set forth in the following paragraphs shall be included in full by the contracting agency in every contract (and any bid specification therefor) entered into by the United States or the District of Columbia, in excess of \$2,500, or in an indefinite amount, the principal purpose of which is to furnish services through the use of service employees:

(a) Service Contract Act of 1965, as amended: This contract, is subject to the Service Contract Act of 1965, as

amended (41 U.S.C. 351) and is subject to the following provisions and to all other applicable provisions of the Act and regulations of the Secretary of Labor issued thereunder (29 CFR Part 4).

(b)(1) Each service employee employed in the performance of this contract by the contractor or any subcontractor shall be paid not less than the minimum monetary wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits determined by the Secretary of Labor or authorized representative, as specified in any wage determination attached to this contract. Unless specified otherwise in the wage determination, the contractor, where relevant, must consider an employee's length of service with the contractor or with the predecessor contractor(s) on the predecessor contract, if any, in determining the employee's wage and fringe benefit entitlements.

(2)(i) If there is such a wage determination attached to this contract, the contracting officer shall require that any class of service employee which is not listed therein and which is to be employed under the contract, be classified by the contractor so as to provide a reasonable relationship (i.e., appropriate level of skill comparison) between such unlisted classifications and the classifications listed in the wage determination. Such conformed class of employees shall be paid the monetary wages and furnished the fringe benefits as are determined by bona fide agreement of the interested parties, who shall be deemed to be the contracting officer, the contractor, and any authorized representative of the unlisted class of employees or, where there is no authorized representative, the employees in the unlisted class who will perform on the contract.

(ii) Such conforming procedure shall be initiated by the contractor at the time of the contract commencement date, or prior to the performance of contract work by such unlisted class of employee if a need for an additional class(es) arises, and shall be concluded no later than 30 days after such unlisted class of employees performs any contract work. A written report of the proposed conforming action, including evidence in writing of the agreement of the authorized representative of the employees involved or, where there is no authorized representative, the employees themselves, shall be promptly submitted by the contractor to the contracting officer who shall review this action, and if he or she agrees, shall promptly submit a report of the action to the Office of Government Contract

Wage Standards, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, for review. The Office of Government Contract Wage Standards will approve or disapprove the action within 30 days of receipt or will notify the contracting officer within 30 days of receipt that additional time is necessary. If the conforming procedure cannot be concluded within the 30-day time period, the contracting officer shall submit an explanation of the special circumstances which prevent a timely agreement to the Office of Government Contract Wage Standards together with a request for additional time for resolution of the matter.

(iii) If the parties do not reach an agreement or acknowledge disagreement within this 30-day period on a proper classification which is, in fact, conformable, the contracting officer shall promptly submit the question, together with his or her recommendations and all pertinent information, including the positions of employees if in disagreement, to the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, of the Department of Labor for final determination. The Office of Government Contract Wage Standards will render a determination within 30 days of receipt or will notify the contracting officer within 30 days of receipt that additional time is necessary.

(iv) The process of establishing wage rates that bear a reasonable relationship to those listed in a wage determination cannot be reduced to any single formula. The approach used may vary from wage determination to wage determination depending on the circumstances. Standard wage and salary administration practices which rank various job classifications by pay grade pursuant to point schemes or other job factors may, for example, be relied upon. Guidance may also be obtained from the way different jobs are rated under Federal pay systems (Federal Wage Board Pay System and the General Schedule) or from other wage determinations issued in the same locality. Basic to the establishment of any conformable wage rate(s) is the concept that a pay relationship should be maintained between job classifications based on the skill required and the duties performed.

(v) Failure to pay such unlisted employees the compensation agreed upon by the interested parties and/or finally determined by the Office of Government Contract Wage Standards retroactive to the date such class of

employees commenced contract work shall be a violation of the Act and this contract.

(vi) No employee engaged in performing work on this contract shall in any event be paid less than the currently applicable minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended.

(vii) Failure by the contractor to comply with its responsibilities in sections (b)(2) (i) through (vi) of this section shall also be a violation of the Act and this contract. Upon discovery of such violation, the Office of Government Contract Wage Standards shall then make a final determination of conformed classification, wage rate, and/or fringe benefits which shall be retroactive to the date such class of employees commenced contract work.

(viii) Any agreement reached by the interested parties will not be considered a bona fide agreement unless the affected employees in the unlisted classification(s) have been provided with a full explanation of the conformance procedures and the basis for arriving at the proposed conformed classification (and wage rate and/or fringe benefits). The affected employees shall be afforded an opportunity to agree or disagree without threat of job reprisal. Upon final determination of this action by the Office of Government Contract Wage Standards, each affected employee shall be furnished by the contractor with a written copy of such determination or it shall be posted as a part of the wage determination.

(3) If, as authorized pursuant to section 4(d) of the Service Contract Act of 1965 as amended, the term of this contract is more than 1 year, the minimum monetary wages and fringe benefits required to be paid or furnished thereunder to service employees shall be subject to adjustment after 1 year and not less often than once every 2 years, pursuant to wage determinations to be issued by the Wage and Hour Division, Employment Standards Administration of the Department of Labor as provided in such Act.

(c) The contractor or subcontractor may discharge the obligation to furnish fringe benefits specified in the attachment or determined conformably thereto by furnishing any equivalent combinations of bona fide fringe benefits, or by making equivalent or differential payments in cash in accordance with the applicable rules set forth in Subpart D of 29 CFR Part 4, and not otherwise.

(d)(1) In the absence of a minimum wage attachment for this contract, neither the contractor nor any subcontractor under this contract shall

pay any person performing work under the contract (regardless of whether they are service employees) less than the minimum wage specified by section 6(a)(1) of the Fair Labor Standards Act of 1938. Nothing in this provision shall relieve the contractor or any subcontractor of any other obligation under law or contract for the payment of a higher wage to any employee.

(2) If this contract succeeds a contract, subject to the Service Contract Act of 1965 as amended under which substantially the same services were furnished and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement, in the absence of the minimum wage attachment for this contract setting forth such collectively bargained wage rates and fringe benefits, neither the contractor nor any subcontractor under this contract shall pay any service employee performing any of the contract work (regardless of whether or not such employee was employed under the predecessor contract), less than the wages and fringe benefits provided for in such collective bargaining agreements, to which such employee would have been entitled if employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement. No contractor or subcontractor under this contract may be relieved of the foregoing obligation unless the limitations of § 4.16(b) of 29 CFR Part 4 apply or unless the Secretary of Labor or his authorized representative determines, after a hearing as provided in § 4.11 of 29 CFR Part 4, that the collective bargaining agreement applicable to service employees employed under the predecessor contract was not entered into as a result of arm's-length negotiations, or finds, after a hearing as provided in § 4.10 of 29 CFR Part 4 that the wages and/or fringe benefits provided for in such agreement are substantially at variance with those which prevail for services of a character similar in the locality. Where the Secretary finds after a hearing in accordance with the review procedures provided in 29 CFR 4.10 and Part 6 that some or all of the wages and/or fringe benefits contained in a predecessor contractor's collective bargaining agreement are substantially at variance with those which prevail for services of a character similar in the locality, the Department will issue a new or revised wage determination setting forth the applicable wage rates and fringe benefits. Such determination shall be

made part of the contract or subcontract, in accordance with the decision of the Administrative Law Judge, or the Secretary, as the case may be irrespective of whether such issuance occurs prior to or after the award of a contract or subcontract. 53 Comp. Gen. 401 (1973).

(e) The contractor and any subcontractor under this contract shall notify each service employee commencing work on this contract of the minimum monetary wage and any fringe benefits required to be paid pursuant to this contract, or shall post the wage determination attached to this contract. The poster provided by the Department of Labor (Publication WH 1313) shall be posted in a prominent and accessible place at the worksite. Failure to comply with this requirement is a violation of section 2(a)(4) of the Act and of this contract.

(f) The contractor or subcontractor shall not permit any part of the services called for by this contract to be performed in buildings or surroundings or under working conditions provided by or under the control or supervision of the contractor or subcontractor which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish these services, and the contractor or subcontractor shall comply with the safety and health standards applied under 29 CFR Part 1925.

(g) The contractor and each subcontractor performing work subject to the Act shall make and maintain for 3 years from the completion of the work records containing the information specified in paragraphs (g)(1) through (5) of this section for each employee subject to the Act and shall make them available for inspection and transcription by authorized representatives of the Wage and Hour Division, Employment Standards Administration of the U.S. Department of Labor:

- (1) Name and address and social security number of each employee.
- (2) The correct work classification or classifications, rate or rates of monetary wages paid and fringe benefits provided, rate or rates of fringe benefit payments in lieu thereof, and total daily and weekly compensation of each employee.
- (3) The number of daily and weekly hours so worked by each employee.
- (4) Any deductions, rebates, or refunds from the total daily or weekly compensation of each employee.
- (5) A list of monetary wages and fringe benefits for those classes of service employees not included in the wage determination attached to this contract but for which such wage rates

or fringe benefits have been determined by the interested parties or by the Administrator or authorized representative pursuant to the labor standards clause in paragraph (b) of this section. A copy of the report required by the clause in paragraph (b)(2)(ii) of this section shall be deemed to be such a list.

(6) Any list of the predecessor contractor's employees which had been furnished to the contractor pursuant to § 4.6(l)(2).

(7) The contractor shall also make available a copy of this contract for inspection or transcription by authorized representatives of the Wage and Hour Division.

(8) The contractor shall permit authorized representatives of the Wage and Hour Division to conduct interviews with employees at the worksite during normal working hours.

Failure to make and maintain or to make available such records for inspection and transcription shall be a violation of the regulations and this contract, and in the case of failure to produce such records, the contracting officer, upon direction of the Department of Labor and notification of the contractor, shall take action to cause suspension of any further payment or advance of funds until such violation ceases.

(h) The contractor shall unconditionally pay to each employee subject to the Act all wages due free and clear and without subsequent deduction (except as otherwise provided by law or Regulations, 29 CFR Part 4), rebate, or kickback on any account. Such payments shall be made no later than one pay period following the end of the regular pay period in which such wages were earned or accrued. A pay period under this Act may not be of any duration longer than semi-monthly.

(i) The contracting officer shall withhold or cause to be withheld from the Government prime contractor under this or any other Government contract with the prime contractor such sums as an appropriate official of the Department of Labor requests or such sums as the contracting officer decides may be necessary to pay underpaid employees employed by the contractor or subcontractor. In the event of failure to pay any employees subject to the Act all or part of the wages or fringe benefits due under the Act, the agency may, after authorization or by direction of the Department of Labor and written notification to the contractor, take action to cause suspension of any further payment or advance of funds until such violations have ceased. Additionally, any failure to comply with

the requirements of these clauses relating to the Service Contract Act of 1965, may be grounds for termination of the right to proceed with the contract work. In such event, the Government may enter into other contracts or arrangements for completion of the work, charging the contractor in default with any additional cost.

(j) The contractor agrees to insert these clauses in this section relating to the Service Contract Act of 1965 in all subcontracts subject to the Act. The term "contractor" as used in these clauses in any subcontract, shall be deemed to refer to the subcontractor, except in the term "Government Prime Contractor."

(k)(1) As used in these clauses, the term "service employee" means any person engaged in the performance of this contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in Part 541 of Title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations. The term "service employee" includes all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

(2) The following statement is included in contracts pursuant to section 2(a)(5) of the Act and is for informational purposes only:

The following classes of service employees expected to be employed under the contract with the Government would be subject, if employed by the contracting agency, to the provisions of 5 U.S.C. 5341 or 5 U.S.C. 5332 and would, if so employed, be paid not less than the following rates, of wages and fringe benefits:

Employee class	Monetary wage-fringe benefits

(l)(1) If wages to be paid or fringe benefits to be furnished any service employees employed by the Government prime contractor or any subcontractor under the contract are provided for in a collective bargaining agreement which is or will be effective during any period in which the contract is being performed, the Government prime contractor shall report such fact to the contracting officer, together with full information as to the application and accrual of such wages and fringe

benefits, including any prospective increases, to service employees engaged in work on the contract, and a copy of the collective bargaining agreement. Such report shall be made upon commencing performance of the contract, in the case of collective bargaining agreements effective at such time, and in the case of such agreements or provisions or amendments thereof effective at a later time during the period of contract performance, such agreements shall be reported promptly after negotiation thereof.

(2) Not less than 10 days prior to completion of any contract being performed at a Federal facility where service employees may be retained in the performance of the succeeding contract and subject to a wage determination which contains vacation or other benefit provisions based upon length of service with a contractor (predecessor) or successor (§ 4.173 of Regulations, 29 CFR Part 4), the incumbent prime contractor shall furnish to the contracting officer a certified list of the names of all service employees on the contractor's or subcontractor's payroll during the last month of contract performance. Such list shall also contain anniversary dates of employment on the contract either with the current or predecessor contractors of each such service employee. The contracting officer shall turn over such list to the successor contractor at the commencement of the succeeding contract.

(m) All rulings and interpretations of the Service Contract Act of 1965, as amended, expressed in Regulations, 29 CFR Part 4 are hereby incorporated by reference in this contract.

(n)(1) By entering into this contract, the contractor (and officials thereof) certifies that neither it (nor he or she) nor any person or firm who has a substantial interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of the sanctions imposed pursuant to section 5 of the Act.

(2) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract pursuant to section 5 of the Act.

(3) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(o) Notwithstanding any of the clauses in paragraphs (b) through (m) of this section relating to the Service Contract Act of 1965, the following employees may be employed in accordance with the following variations, tolerances, and exemptions, which the Secretary of Labor, pursuant to section 4(b) of the Act prior to its amendment by Public

Law 92-473, found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business:

(i) Apprentices, student-learners, and workers whose earning capacity is impaired by age, physical, or mental deficiency or injury may be employed at wages lower than the minimum wages otherwise required by section 2(a)(1) or 2(b)(1) of the Service Contract Act without diminishing any fringe benefits or cash payments in lieu thereof required under section 2(a)(2) of that Act, in accordance with the conditions and procedures prescribed for the employment of apprentices, student-learners, handicapped persons, and handicapped clients of sheltered workshops under section 14 of the Fair Labor Standards Act of 1938, in the regulations issued by the Administrator (29 CFR Parts 520, 521, 524, and 525).

(ii) The Administrator will issue certificates under the Service Contract Act for the employment of apprentices, student-learners, handicapped persons, or handicapped clients of sheltered workshops not subject to the Fair Labor Standards Act of 1938, or subject to different minimum rates of pay under the two acts, authorizing appropriate rates of minimum wages (but without changing requirements concerning fringe benefits or supplementary cash payments in lieu thereof), applying procedures prescribed by the applicable regulations issued under the Fair Labor Standards Act of 1938 (29 CFR Parts 520, 521, 524, and 525).

(iii) The Administrator will also withdraw, annul, or cancel such certificates in accordance with the regulations in Parts 525 and 528 of Title 29 of the Code of Federal Regulations.

(p) Apprentices will be permitted to work at less than the predetermined rate for the work they perform when they are employed and individually registered in a bona fide apprenticeship program registered with a State Apprenticeship Agency which is recognized by the U.S. Department of Labor, or if no such recognized agency exists in a State, under a program registered with the Bureau of Apprenticeship and Training, Employment and Training Administration, U.S. Department of Labor. Any employee who is not registered as an apprentice in an approved program shall be paid the wage rate and fringe benefits contained in the applicable wage determination for the journeyman classification of work actually performed. The wage rates paid apprentices shall not be less than the wage rate for their level of progress set forth in the registered program, expressed as the appropriate percentage

of the journeyman's rate contained in the applicable wage determination. The allowable ratio of apprentices to journeymen employed on the contract work in any craft classification shall not be greater than the ratio permitted to the contractor as to his entire work force under the registered program.

(q) An employee engaged in an occupation in which he or she customarily and regularly receives more than \$30 a month in tips may have the amount of tips credited by the employer against the minimum wage required by section 2(a)(1) or section 2(b)(1) of the Act in accordance with section 3 (m) of the Fair Labor Standards Act and Regulations, 29 CFR Part 531: Provided, however, That the amount of such credit may not exceed \$1.24 per hour beginning January 1, 1980, and \$1.34 per hour after December 31, 1980. To utilize this proviso:

(1) the employer must inform tipped employees about this tip credit allowance before the credit is utilized;

(2) the employees must be allowed to retain all tips (individually or through a pooling arrangement and regardless of whether the employer elects to take a credit for tips received);

(3) the employer must be able to show by records that the employee receives at least the applicable Service Contract Act minimum wage through the combination of direct wages and tip credit;

(4) the use of such tip credit must have been permitted under any predecessor collective bargaining agreement applicable by virtue of section 4(c) of the Act.

§ 4.7 Labor standards clause for Federal service contracts not exceeding \$2,500.

Every contract with the Federal Government which is not in excess of \$2,500 but has as its principal purpose the furnishing of services through the use of service employees shall contain the following clause:

Service Contract Act. Except to the extent that an exemption, variation or tolerance would apply if this were a contract in excess of \$2,500, the contractor and any subcontractor hereunder shall pay all of his employees engaged in performing work on the contract not less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. All regulations and interpretations of the Service Contract Act of 1965 expressed in 29 CFR Part 4 are hereby incorporated by reference in this contract.

§ 4.8 Notice of awards.

Whenever an agency of the United States or the District of Columbia awards a contract subject to the Act which may be in excess of \$2,500, it shall furnish the Office of Government Contract Wage Standards, Wage and Hour Division, ESA, an original and one copy of Standard Form 99, Notice of Award of Contract. The form shall be completed as follows:

- (a) Items 1 through 7 and 12 and 13: Self-explanatory;
- (b) Item 8: Enter the notation "Service Contract Act";
- (c) Item 9: Leave blank;
- (d) Item 10: (1) Enter the notation "Major Category," and indicate beside this entry the general service area into which the contract falls [e.g., food services, grounds maintenance, computer services, installation or facility support services, custodial-janitorial service, garbage collection, insect and rodent control, laundry and drycleaning services, etc.];
- (e) Item 11: Enter the dollar amount of the contract, or the estimated dollar value with the notation "estimated" (if the exact amount is not known). If neither the exact nor the estimated dollar value is known, enter "indefinite," or "not to exceed \$—." Supplies of Standard Form 99 are available in all GSA supply depots under stock number 7540-634-4049.

§ 4.9 [Reserved]**§ 4.10 Substantial variance proceedings under section 4(c) of the Act.**

(a) *Statutory provision.* Under section 4(c) of the Act, and under corresponding wage determinations made as provided in section 2(a)(1) and (2) of the Act, contractors and subcontractors performing contracts subject to the Act generally are obliged to pay to service employees employed on the contract work wages and fringe benefits not less than those to which they would have been entitled under a collective bargaining agreement if they were employed on like work under a predecessor contract. (See §§ 4.1b, 4.3, 4.8(d)(2).) Section 4(c) of the Act provides, however, that "such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality".

(b) *Prerequisites for hearing.* (1)(i) A request for a hearing under this section may be made by the contracting agency or other person affected or interested, including contractors or prospective

contractors and associations of contractors, representatives of employees, and other interested Governmental agencies. Such a request shall be submitted in writing to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, to the attention of the Office of Government Contract Wage Standards, and shall include the following:

(A) The number of any wage determination at issue, the name of the contracting agency whose contract is involved, and a brief description of the services to be performed under the contract;

(B) A statement regarding the status of the procurement and any estimated procurement dates, such as bid opening, contract award, commencement date of the contract or its follow-up option period;

(C) A statement of the applicant's case, setting forth in detail the reasons why the applicant believes that a substantial variance exists with respect to some or all of the wages and/or fringe benefits, attaching available data concerning wages and/or fringe benefits prevailing in the locality;

(D) Names and addresses (to the extent known) of interested parties.

(ii) If the information in paragraph (b)(1)(i) of this section is not submitted with the request, the Administrator may deny the request or request supplementary information, at his/her discretion. No particular form is prescribed for submission of a request under this section.

(2) No hearing will be provided pursuant to this section and section 4(c) of the Act unless the Administrator determines from information available or submitted with a request for such a hearing that there may be a substantial variance between some or all of the wage rates and/or fringe benefits provided for in a collective bargaining agreement to which the service employees would otherwise be entitled by virtue of the provisions of section 4(c) of the Act, and those which prevail for services of a character similar in the locality.

(3) Pursuant to section 4(b) of the Act, requests for a hearing shall not be considered unless received as specified below, except in those situations where the Administrator determines that extraordinary circumstances exist:

(i) For advertised contracts, prior to ten days before the award of the contract;

(ii) For negotiated contracts and for contracts with provisions extending the initial term by option, prior to the

commencement date of the contract or the follow-up option period, as the case may be.

(c) *Referral to the Chief Administrative Law Judge.* When the Administrator determines from the information available or submitted with a request for a hearing that there may be a substantial variance, the Administrator on his own motion or on application of any interested person may by order refer the issue to the Chief Administrative Law Judge, for designation of an Administrative Law Judge who shall conduct such a fact finding hearing as may be necessary to render a decision solely on the issue of whether the wages and/or fringe benefits contained in the collective bargaining agreement which was the basis for the wage determination at issue are substantially at variance with those which prevail for services of a character similar in the locality. However, in situations where there is also a question as to whether the collective bargaining agreement was reached as a result of "arm's-length negotiations" (see § 4.11), the referral shall include both issues for resolution in one proceeding. No authority is delegated under this section to hear and/or decide any other issues pertaining to the Service Contract Act. As provided in section 4(a) of the Act, the provisions of §§ 4 and 5 of the Walsh-Healey Public Contracts Act (41 U.S.C. 38, 39) shall be applicable to such proceeding, which shall be conducted in accordance with the procedures set forth at 29 CFR Part 6, Subpart B.

(d) The Administrator shall be an interested party and shall have the opportunity to participate in the proceeding to the degree he/she considers appropriate.

§ 4.11 Arm's length proceedings.

(a) *Statutory provision.* Under Section 4(c) of the Act, the wages and fringe benefits provided in the predecessor contractor's collective bargaining agreement must be reached "as a result of arm's-length negotiations." This provision precludes arrangements by parties to a collective bargaining agreement who, either separately or together, acted with an intent to manipulate, exploit or otherwise take advantage of the wage determination scheme provided for in Sections 2(a) and 4(c) of the Act, or situations where it has been determined by the National Labor Relations Board that "good faith" bargaining did not occur. If the National Labor Relations Board makes such a finding, the Administrator shall issue a decision based on that finding and that decision shall be final and not subject to

appeal. A finding as to whether a collective bargaining agreement or particular wages and fringe benefits therein are reached as a result of arm's-length negotiations may be made through investigation, hearing or otherwise pursuant to the Secretary's authority under Section 4(a) of the Act.

(b)(1) A request for a determination under this section may be made by a contracting agency or other person affected or interested, including contractors or prospective contractors and associations of contractors, representatives of employees, and interested Governmental agencies. Such a request shall be submitted in writing to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, to the attention of the Office of Government Contract Wage Standards. Although no particular form is prescribed for submission of a request under this section, such request shall include the following information:

(i) A statement of the applicant's case setting forth in detail the reasons why the applicant believes that the wages and fringe benefits contained in the collective bargaining agreement were not reached as a result of arm's-length negotiations;

(ii) A statement regarding the status of the procurement and any estimated procurement dates, such as bid opening, contract award, commencement date of the contract or its follow-up option period;

(iii) Names and addresses (to the extent known) of interested parties.

(2) Pursuant to Section 4(b) of the Act, requests for a hearing shall not be considered unless received as specified below except in those situations where the Administrator determines that extraordinary circumstances exist:

(i) For advertised contracts, prior to ten days before the award of the contract;

(ii) For negotiated contracts and for contracts with provisions extending the term by option, prior to the commencement date of the contract or the follow-up option period, as the case may be.

(c)(1) The Administrator, on his/her own motion or after receipt of a request for a determination, may make a finding on the issue of arm's-length negotiations.

(2) If the Administrator determines that there may not have been arm's-length negotiations, but finds that there is insufficient evidence to render a final decision thereon, the Administrator may refer the issue to the Chief Administrative Law Judge in accordance with subsection (d).

(3)(i) If the Administrator finds that the collective bargaining agreement or wages and fringe benefits at issue were reached as a result of arm's-length negotiations or that arm's-length negotiations did not take place, the interested parties, including the parties to the collective bargaining agreement, will be notified of the Administrator's findings, which shall include the reasons therefor, and such parties shall be afforded an opportunity to request that a hearing be held to render a decision on the issue of arm's-length negotiations.

(ii) Such parties shall have 20 days from the date of the Administrator's ruling to request a hearing. A detailed statement of the reasons why the Administrator's ruling is in error, including facts alleged to be in dispute, if any, shall be submitted with the request for a hearing.

(iii) If no hearing is requested within the time mentioned in paragraph (c)(3)(ii) of this section above, the Administrator's ruling shall be final, and, in the case of a finding that arm's-length negotiations did not take place, a new wage determination will be issued for the contract. If a hearing is requested, the decision of the Administrator shall be inoperative.

(d) Referral to the Chief Administrative Law Judge. The Administrator on his/her own motion, under paragraph (c)(2) or upon a request for a hearing under paragraph (c)(3)(ii) where the Administrator determines that material facts are in dispute, shall by order refer the issue to the Chief Administrative Law Judge for designation of an Administrative Law Judge, who shall conduct such hearings as may be necessary to render a decision solely on the issue of arm's-length negotiations. However, in situations where there is also a question as to whether some or all of the collectively bargained wage rates and/or fringe benefits are substantially at variance (see § 4.10), the referral shall include both issues for resolution in one proceeding. As provided in Section 4(a) of the Act, the provisions of Sections 4 and 5 of the Walsh-Healey Public Contracts Act (41 U.S.C. 38, 39) shall be applicable to such proceeding, which shall be conducted in accordance with the procedures set forth at 29 CFR Part 6.

(e) Referral to the Secretary. When a party requests a hearing under paragraph (c)(3)(ii) and the Administrator determines that no material facts are in dispute, the Administrator shall refer the issue and the record compiled thereon to the Secretary to render a decision solely on the issue of arm's-length negotiations.

Such proceeding shall be conducted in accordance with the procedures set forth at 29 CFR Part 6.

§ 4.12 Substantial interest proceedings

(a) *Statutory provision.* Under Section 5(a) of the Act, no contract of the United States (or the District of Columbia) shall be awarded to the persons or firms appearing on the list distributed by the Comptroller General giving the names of persons or firms who have been found to have violated the Act until 3 years have elapsed from the date of publication of the list. Section 5(a) further states that "no contract of the United States shall be awarded * * * to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest * * *." A finding as to whether persons or firms whose names appear on the debarred bidders list have a substantial interest in any other firm, corporation, partnership, or association may be made through investigation, hearing, or otherwise pursuant to the Secretary's authority under Section 4(a) of the Act.

(b) *Ineligibility.* See § 4.188 of this part for the Secretary's rulings and interpretations with respect to substantial interest.

(c)(1) A request for a determination under this section may be made by any interested party, including contractors or prospective contractors, and associations of contractors, representatives of employees, and interested Governmental agencies. Such a request shall be submitted in writing to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, to the attention of the Office of Government Contract Wage Standards.

(2) The request shall include a statement setting forth in detail why the petitioner believes that a person or firm whose name appears on the debarred bidders list has a substantial interest in any firm, corporation, partnership, or association which is seeking or has been awarded a contract of the United States or the District of Columbia. No particular form is prescribed for the submission of a request under this section.

(d)(1) The Administrator, on his/her own motion or after receipt of a request for a determination, may make a finding on the issue of substantial interest.

(2) If the Administrator determines that there may be a substantial interest, but finds that there is insufficient evidence to render a final ruling thereon, the Administrator may refer the issue to the Chief Administrative Law Judge in accordance with subsection (e).

(3) If the Administrator finds that no substantial interest exists, or that there is not sufficient information to warrant the initiation of an investigation, the requesting party, if any, will be so notified and no further action taken.

(4)(i) If the Administrator finds that a substantial interest exists, the person or firm affected will be notified of the Administrator's finding, which shall include the reasons therefor, and such person or firm shall be afforded an opportunity to request that a hearing be held to render a decision on the issue of substantial interest.

(ii) Such person or firm shall have 20 days from the date of the Administrator's ruling to request a hearing. A detailed statement of the reasons why the Administrator's ruling is in error, including facts alleged to be in dispute, if any, shall be submitted with the request for a hearing.

(iii) If no hearing is requested within the time mentioned in subparagraph (ii) above, the Administrator's finding shall be final and the Administrator shall so notify the Comptroller General. If a hearing is requested, the decision of the Administrator shall be inoperative unless and until the Administrative Law Judge or the Secretary issues an order that there is a substantial interest.

(e) *Referral to the Chief Administrative Law Judge.* The Administrator on his/her own motion, or upon a request for a hearing where the Administrator determines that relevant facts are in dispute, shall by order refer the issue to the Chief Administrative Law Judge, for designation of an Administrative Law Judge who shall conduct such hearings as may be necessary to render a decision solely on the issue of substantial interest. As provided in Section 4(a) of the Act, the provisions of Sections 4 and 5 of the Walsh-Healey Public Contracts Act (41 U.S.C. 38, 39) shall be applicable to such proceedings, which shall be conducted in accordance with the procedures set forth at 29 CFR Part 6.

(f) *Referral to the Secretary.* When the person or firm requests a hearing and the Administrator determines that relevant facts are not in dispute, the Administrator will refer the issue and the record compiled thereon to the Secretary to render a decision solely on the issue of substantial interest. Such proceeding shall be conducted in accordance with the procedures set forth at 29 CFR Part 6.

Subpart B—Wage Determination Procedures

§ 4.50 Types of wage and fringe benefit determinations.

The Administrator specifies the minimum monetary wages and fringe benefits to be paid as required under the Act in two types of determinations:

(a) *Prevailing in the Locality.*

Determinations that set forth minimum monetary wages and fringe benefits determined to be prevailing for various classes of service employees in the locality (sections 2(a)(1) and 2(a)(2) of the Act) after giving "due consideration" to the rates applicable to such service employees if directly hired by the Federal Government (section 2(a)(5) of the Act); and

(b) *Collective Bargaining Agreement—(Successorship).*

Determinations that set forth the wage rates and fringe benefits, including accrued and prospective increases, contained in a collective bargaining agreement applicable to the service employees under the predecessor contract.

§ 4.51 Prevailing in the locality determinations.

(a) *Information considered.* The minimum monetary wages and fringe benefits set forth in determinations of the Secretary are based on all available pertinent information as to wage rates and fringe benefits being paid at the time the determination is made. Such information is most frequently derived from area surveys made by the Bureau of Labor Statistics, U.S. Department of Labor, or other Labor Department personnel. Information may also be obtained from Government contracting officers and from other available sources, including employees and their representatives and employers and their associations. The determinations may be based on the wage rates and fringe benefits contained in collective bargaining agreements where they have been determined to prevail in a locality for specified occupational class(es) of employees.

(b) *Determination of Prevailing Rates.* Where a single rate is paid to a majority (50 percent or more) of the workers in a class of service employees engaged in similar work in a particular locality, that rate is determined to prevail. The wage rates and fringe benefits in a collective bargaining agreement covering 2,001 janitors in a locality, for example, prevail if it is determined that no more than 4,000 workers are engaged in such janitorial work in that locality. In the case of information developed from surveys, statistical measurements of

central tendency such as a median (a point in a distribution of wage rates where 50 percent of the surveyed workers receive that or a higher rate and an equal number receive a lesser rate) or the mean (average) are considered reliable indicators of the prevailing rate. Which of these statistical measurements will be applied in a given case will be determined after a careful analysis of the overall survey, separate classification data, patterns existing between survey periods, and the way the separate classification data interrelate. Use of the median is the general rule. However, the mean (average) rate may be used in situations where, after analysis, it is determined that the median is not a reliable indicator. Examples where the mean may be used include situations where:

(1) The number of workers studied for the job classification constitutes a relatively small sample and the computed median results in an actual rate that is paid to few of the studied workers in the class;

(2) Statistical deviation such as a skewed (bimodal or multimodal) frequency distribution biases the median rate due to large concentrations of workers toward either end of the distribution curve and the computed median results in an actual rate that is paid to few of the studied workers in the class; or

(3) The computed median rate distorts historic wage relationships between job levels within a classification family, (i.e., Electronic Technician Classes A, B, and C levels within the Electronic technician classification family), between classifications of different skill levels (i.e., a maintenance electrician as compared with a maintenance carpenter), or, for example, yields a wage movement inconsistent with the pattern shown by the survey overall or with related and/or similarly skilled job classifications.

(c) *Due consideration.* In making wage and fringe benefit determinations, section 2(a)(5) of the Act requires that due consideration be given to the rates that would be paid by the Federal agency to the various classes of service employees if § 5341 or § 5332 of Title 5, United States Code, were applicable to them. Section 5341 refers to the Wage Board or Coordinated Federal Wage System for "blue collar" workers and § 5332 refers to the General Schedule pay system for "white collar" workers. The term "due consideration" implies the exercise of discretion on the basis of the facts and circumstances surrounding each determination, recognizing the legislative objective of narrowing the gap between the wage rates and fringe

benefits prevailing for service employees and those established for Federal employees. Each wage determination is based on a survey or other information on the wage rates and fringe benefits being paid in a particular locality and also takes into account those wage rates and fringe benefits which would be paid under Federal pay systems.

§ 4.52 Collective bargaining agreement (successorship) determinations.

Determinations based on the collective bargaining agreement of a predecessor contractor set forth by job classification each provision relating to wages (such as the established straight time hourly or salary rate, cost-of-living allowance, and any shift, hazardous, and other similar pay differentials) and to fringe benefits (such as holiday pay, vacation pay, sick leave pay, life, accidental death, disability, medical, and dental insurance plans, retirement or pension plans, severance pay, supplemental unemployment benefits, saving and thrift plans, stock-option plans, funeral leave, jury/witness leave, or military leave) contained in the predecessor's collective bargaining agreement, as well as conditions governing the payment of such wages and fringe benefits. Accrued wages and fringe benefits and prospective increases therein are also included. Each wage determination is limited in application to a specific contract succeeding a contract which had been performed by a contractor with a collective bargaining agreement, and contains a notice to prospective bidders regarding their obligations under section 4(c) of the Act.

§ 4.53 Locality basis of wage and fringe benefit determinations.

(a) Under section 2(a) of the Act, the Secretary or his authorized representative is given the authority to determine the minimum monetary wages and fringe benefits prevailing for various classes of service employees "in the locality". Although the term "locality" has reference to a geographic area, it has an elastic and variable meaning and contemplates consideration of the existing wage structures which are pertinent to the employment of particular classes of service employees on the varied kinds of service contracts. Because wage structures are extremely varied, there can be no precise single formula which would define the geographic limits of a "locality" that would be relevant or appropriate for the determination of prevailing wage rates and prevailing fringe benefits in all situations under the Act. The locality

within which a wage or fringe benefit determination is applicable is, therefore, defined in each such determination upon the basis of all the facts and circumstances pertaining to that determination. Locality is ordinarily limited geographically to a particular county or cluster of counties comprising a metropolitan area. For example, a survey by the Bureau of Labor Statistics of the Baltimore, Maryland Standard Metropolitan Statistical Area includes the counties of Baltimore, Harford, Howard, Anne Arundel, and the City of Baltimore. A wage determination based on such information would define locality as the same geographic area included within the scope of the survey. Locality may also be defined as, for example, a city, a State, or, under rare circumstances, a region, depending on the actual place or places of contract performance, the geographical scope of the data on which the determination was based, the nature of the services being contracted for, and the procurement method used. In addition, in *Southern Packaging & Storage Co. v. United States*, 618 F.2d 1088 (4th Cir. 1980), the court held that a nationwide wage determination normally is not permissible under the Act, but postulated that "there may be the rare and unforeseen service contract which might be performed at locations throughout the country and which would generate truly nationwide competition."

(b) Where the wage rates and fringe benefits contained in a collective bargaining agreement applicable to the predecessor contract are set forth in a determination, locality in such a determination is typically described as the geographic area in which the Federal facility is situated. The determination applies to any successor contractor, regardless of place of performance and whether the place of performance is known at the time of bid advertising.

§ 4.54 Issuance and revision of wage determinations.

(a) Section 4.4 of Subpart A requires that the awarding agency file a notice of intention to make a service contract which is subject to the Act with the Office of Government Contract Wage Standards, Wage and Hour Division, Employment Standards Administration, prior to any invitation for bids or the commencement of negotiations for any contract exceeding \$2,500. Upon receipt of the notice, the Office of Government Contract Wage Standards may issue a new determination of minimum monetary wages and fringe benefits for the classes of service employees who will perform work on the contract or

may revise a determination which is currently in effect.

(b) Determinations will be reviewed periodically and where prevailing wage rates or fringe benefits have changed, such changes will be reflected in revised determinations. For example, in a locality where it is determined that the wage rate which prevails for a particular class of service employees is the rate specified in a collective bargaining agreement(s) applicable in that locality, and such agreement(s) specifies increases in such rates to be effective on specific dates, the determinations would be revised to reflect such changes as they become effective. Revised determinations shall be applicable to contracts in accordance with the provisions of § 4.5(a)(2) of Subpart A.

(c) Determinations issued by the Office of Government Contract Wage Standards with respect to particular contracts are required to be incorporated in the invitations for bids or requests for proposals or quotations issued by the contracting agencies, and are to be incorporated in the contract specifications in accordance with § 4.5 of Subpart A. In this manner, prospective contractors and subcontractors are advised of the minimum monetary wages and fringe benefits required under the most recently applicable determination to be paid the service employees who perform the contract work. These requirements are, of course, the same for all bidders so none will be placed at a competitive disadvantage.

§ 4.55 Review and reconsideration of wage determinations.

(a) *Review by the Administrator.* (1) Any interested party affected by a wage determination issued under section 2(a) of the Act may request review and reconsideration by the Administrator. A request for review and reconsideration may be made by the contracting agency or other interested party, including contractors or prospective contractors and associations of contractors, representatives of employees, and other interested Governmental agencies. Any such request must be accompanied by supporting evidence. In no event shall a request for review of any aspect of a wage determination, including its accuracy or its applicability, be considered after the opening of bids in the case of a competitively advertised procurement, or after the commencement of a contract in the case of a negotiated procurement. This limitation is necessary in order to ensure competitive equality and an orderly procurement process.

(2) The Administrator shall, upon receipt of a request for reconsideration, review the data sources relied upon as a basis for the wage determination, the evidence furnished by the party requesting review or reconsideration, and, if necessary to resolve the matter, any additional information found to be relevant to determining prevailing wage rates and fringe benefits in a particular locality. The Administrator, pursuant to a review of available information, may issue a new wage determination, may cause the wage determination to be revised, or may affirm the wage determination issued, and will notify the requesting party in writing of the action taken. The Administrator will render a decision within 30 days of receipt of the request or will notify the requesting party in writing within 30 days of receipt that additional time is necessary.

(b) *Review by the Secretary.* Any decision of the Administrator under paragraph (a) of this section may be appealed to the Secretary within 20 days of issuance of the Administrator's decision. Any such appeal shall be in accordance with the provisions of Part 6 of this title.

Subpart C—Application of the McNamara-O'Hara Service Contract Act

Introductory

§ 4.101 Official rulings and interpretations in this subpart.

(a) The purpose of this subpart is to provide, pursuant to the authority cited in § 4.102, official rulings and interpretations with respect to the application of the McNamara-O'Hara Service Contract Act for the guidance of the agencies of the United States and the District of Columbia which may enter into and administer contracts subject to its provisions, the persons desiring to enter into such contracts with these agencies, and the contractors, subcontractors, and employees who perform work under such contracts.

(b) These rulings and interpretations are intended to indicate the construction of the law and regulations which the Department of Labor believes to be correct and which will be followed in the administration of the Act unless and until directed otherwise by Act of Congress or by authoritative ruling of the courts, or if it is concluded upon reexamination of an interpretation that it is incorrect. See for example, *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944); *Roland Co. v. Walling*, 326 U.S. 657 (1946); *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507-509 (1943); *Perkins v. Lukens Steel Co.*, 310 U.S. 113,

128 (1940); *United States v. Western Pacific Railroad Co.*, 352 U.S. 59 (1956). The Department of Labor (and not the contracting agencies) has the primary and final authority and responsibility for administering and interpreting the Act, including making determinations of coverage. See *Woodside Village v. Secretary of Labor*, 611 F.2d 312 (9th Cir. 1980); *Nello L. Teer Co. v. United States*, 348 F.2d 533, 539-540 (Ct. Cl. 1965), cert. denied, 383 U.S. 934 (Davis-Bacon Act); *North Georgia Building & Construction Trades Council v. U.S. Department of Transportation*, 399 F. Supp. 58, 63 (N.D. Ga. 19075) (Davis-Bacon Act); *Zachry Co. v. United States*, 344 F.2d 352 (Ct. Cl. 1965) (Davis-Bacon Act); *Curtiss-Wright Corp. v. McLucas*, 364 F. Supp. 750, 769-72 (D.N.J. 1973); and 43 Atty. Gen. Ops. — (March 9, 1979); 53 Comp. Gen. 647, 649-51 (1974); 57 Comp. Gen. 501, 506 (1978).

(c) Court decisions arising under the Act (as well as under related remedial labor standards laws such as the Walsh-Healey Public Contracts Act, the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act, and the Fair Labor Standards Act) which support policies and interpretations contained in this part are cited where it is believed that they may be helpful. On matters which have not been authoritatively determined by the courts, it is necessary for the Secretary of Labor and the Administrator to reach conclusions as to the meaning and the application of provisions of the law in order to carry out their responsibilities of administration and enforcement (*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). In order that these positions may be made known to persons who may be affected by them, official interpretations and rulings are issued by the Administrator with the advice of the Solicitor of Labor, as authorized by the Secretary (Secretary's Order No. 16-75, Nov. 21, 1975, 40 FR 55913; Employment Standards Order No. 2-76, Feb. 23, 1976, 41 FR 9016). These interpretations are a proper exercise of the Secretary's authority. *Idaho Sheet Metal Works v. Wirtz*, 383 U.S. 190, 208 (1966), reh. den. 383 U.S. 963 (1966). References to pertinent legislative history, decisions of the Comptroller General and of the Attorney General, and Administrative Law Judges' decisions are also made in this part where it appears they will contribute to a better understanding of the stated interpretations and policies.

(d) The interpretations of the law contained in this part are official interpretations which may be relied upon. The Supreme Court has recognized that such interpretations of

the Act "provide a practical guide to employers and employees as to how the office representing the public interest in its enforcement will seek to apply it" and "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance" (*Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Interpretations of the agency charged with administering an Act are generally afforded deference by the courts. (*Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Udall v. Tallman*, 380 U.S. 1 (1965).) Some of the interpretations in this part relating to the application of the Act are interpretations of provisions which appeared in the original Act before its amendments in 1972 and 1976. Accordingly, the Department of Labor considers these interpretations to be correct, since there were no amendments of the statutory provisions which they interpret. (*United States v. Davison Fuel & Dock Co.*, 371 F.2d 705, 711-12 (C.A. 4, 1967).)

(e) On and after final publication of this part in the Federal Register, the interpretations contained herein shall be in effect and shall remain in effect until they are modified, rescinded, or withdrawn. This part supersedes and replaces certain interpretations previously published in the Federal Register and Code of Federal Regulations as Part 4 of this chapter. Prior opinions, rulings, and interpretations and prior enforcement policies which are not inconsistent with the interpretations in this part or with the Act as amended are continued in effect; all other opinions, rulings, interpretations, and enforcement policies on the subjects discussed in the interpretations in this part, to the extent they are inconsistent with the rules herein stated, are superseded, rescinded, and withdrawn.

(f) Principles governing the application of the Act as set forth in this subpart are clarified or amplified in particular instances by illustrations and examples based on specific fact situations. Since such illustrations and examples cannot and are not intended to be exhaustive, or to provide guidance on every problem which may arise under the Act, no inference should be drawn from the fact that a subject or illustration is omitted.

(g) It should not be assumed that the lack of discussion of a particular subject in this subpart indicates the adoption of any particular position by the Department of Labor with respect to such matter or to constitute an interpretation, practice, or enforcement policy. If doubt arises or a question

exists, inquiries with respect to matters other than safety and health standards should be directed to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, or to any regional office of the Wage and Hour Division. Safety and health inquiries should be addressed to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, D.C. 20210, or to any OSHA regional office. A full description of the facts and any relevant documents should be submitted if an official ruling is desired.

§ 4.102 Administration of the Act.

As provided by section 4 of the Act and under provisions of sections 4 and 5 of the Walsh-Healey Public Contracts Act (49 Stat. 2036, 41 U.S.C. 38, 39) which are made expressly applicable for the purpose, the Secretary of Labor is authorized and directed to administer and enforce the provisions of the McNamara-O'Hara Service Contract Act, to make rules and regulations, issue orders, make decisions, and take other appropriate action under the Act. The Secretary is also authorized to make reasonable limitations and to make rules and regulations allowing reasonable variations, tolerances, and exemptions to and from provisions of the Act (except section 10), but only in special circumstances where it is determined that such action is necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business and is in accord with the remedial purposes of the Act to protect prevailing labor standards. The authority and enforcement powers of the Secretary under the Act are coextensive with the authority and powers under the Walsh-Healey Act. *Curtiss Wright Corp. v. McLucas* 364 F. Supp. 750, 769 (D.N.J. 1973).

§ 4.103 The Act.

The McNamara-O'Hara Service Contract Act of 1965 (Pub. L. 89-286, 79 Stat. 1034, 41 U.S.C. 351 et seq.), hereinafter referred to as the Act, was approved by the President on October 22, 1965 (1 Weekly Compilation of Presidential Documents 428). It establishes standards for minimum compensation and safety and health protection of employees performing work for contractors and subcontractors on service contracts entered into with the Federal Government and the District of Columbia. It applies to contracts entered into pursuant to negotiations concluded or invitations for bids issued on or after January 20, 1966. It has been amended by Pub. L. 92-473, 86 Stat. 798;

by Pub. L. 93-57, 87 Stat. 140; and by Pub. L. 94-489, 90 Stat. 2358.

§ 4.104 What the Act provides, generally.

(a) The provisions of the Act apply to contracts, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees. Under its provisions, every contract subject to the Act (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of \$2,500 must contain stipulations as set forth in § 4.6 of this Part requiring (a) that specified minimum monetary wages and fringe benefits determined by the Secretary of Labor (based on wage rates and fringe benefits prevailing in the locality or, in specified circumstances, the wage rates and fringe benefits contained in a collective bargaining agreement applicable to employees who performed on a predecessor contract) be paid to service employees employed by the contractor or any subcontractor in performing the services contracted for; (b) that working conditions of such employees which are under the control of the contractor or subcontractor meet safety and health standards; and (c) that notice be given to such employees of the compensation due them under the minimum wage and fringe benefits provisions of the contract. Contractors performing work subject to the Act thus enter into competition to obtain Government business on terms of which they are fairly forewarned by inclusion in the contract. (*Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 507 (1943).) The Act's purpose is to impose obligations upon those favored with Government business by precluding the use of the purchasing power of the Federal Government in the unfair depression of wages and standards of employment. (See H.R. Rep. No. 948, 89th Cong., 1st Sess. 2-3 (1965); S. Rep. No. 798, 89th Cong., 1st Sess. 3-4 (1965).) The Act does not permit the monetary wage rates specified in such a contract to be less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act, as amended (29 U.S.C. 206(a)(1)). In addition, it is a violation of the Act for any contractor or subcontractor under a Federal contract subject to the Act, regardless of the amount of the contract, to pay any of his employees engaged in performing work on the contract less than such Fair Labor Standards Act minimum wage. Contracts of \$2,500 or less are not, however, required to contain the stipulations described above. These provisions of the Service Contract Act are implemented by the regulations

contained in this Part 4 and are discussed in more detail in subsequent sections of Subparts C, D, and E.

§ 4.105 The Act as amended.

(a) The provisions of the Act (see §§ 4.102-4.103) were amended, effective October 9, 1972, by Public Law 92-473, signed into law by the President on that date. By virtue of amendments made to paragraphs (1) and (2) of section 2(a) and the addition to section 4 of a new subsection (c), the compensation standards of the Act (see §§ 4.159-4.179) were revised to impose on successor contractors certain requirements (see § 4.1b) with respect to payment of wage rates and fringe benefits based on those agreed upon for substantially the same services for the same location in collective bargaining agreements entered into by their predecessor contractors (unless such agreed compensation is substantially at variance with that locally prevailing or the agreement was not negotiated at arm's length). The Secretary of Labor is to give effect to the provisions of such collective bargaining agreements in his wage determinations under section 2 of the Act. A new paragraph (5) added to section 2(a) of the Act requires a statement in the government service contract of the rates that would be paid by the contracting agency in the event of its direct employment of those classes of service employees to be employed on the contract work who, if directly employed by the agency, would receive wages determined as provided in 5 U.S.C. 5341. The Secretary of Labor is directed to give due consideration to such rates in determining prevailing monetary wages and fringe benefits under the Act's provisions. Other provisions of the 1972 amendments include the addition of a new section 10 to the Act to insure that wage determinations are issued by the Secretary for substantially all service contracts subject to section 2(a) of the Act at the earliest administratively feasible time; an amendment to section 4(b) of the Act to provide, in addition to the conditions previously specified for issuance of administrative limitations, variations, tolerances, and exemptions (see § 4.123), that administrative action in this regard shall be taken only in special circumstances where the Secretary determines that it is in accord with the remedial purpose of the Act to protect prevailing labor standards; and a new subsection (d) added to section 4 of the Act providing for the award of service contracts for terms not more than 5 years with provision for periodic adjustment of minimum wage rates and fringe benefits payable thereunder by

the issuance of wage determinations by the Secretary of Labor during the term of the contract. A further amendment to section 5(a) of the Act requires the names of contractors found to have violated the Act to be submitted for the debarment list (see § 4.188) not later than 90 days after the hearing examiner's finding of violation unless the Secretary recommends relief, and provides that such recommendations shall be made only because of unusual circumstances.

(b) The provisions of the Act were amended by Pub. L. 93-57, 87 Stat. 140, effective July 6, 1973, to extend the Act's coverage to Canton Island.

(c) The provisions of the Act were amended by Pub. L. 94-489, 90 Stat. 2358, approved October 13, 1976, to extend the Act's coverage to white collar workers. Accordingly, the minimum wage protection of the Act now extends to all workers, both blue collar and white collar, other than persons employed in a bona fide executive, administrative, or professional capacity as those terms are used in the Fair Labor Standards Act and in Part 541 of Title 29, Pub. L. 94-489 accomplished this change by adding to Section 2(a)(5) of the Act a reference to 5 U.S.C. 5332, which deals with white collar workers, and by amending the definition of service contract employee in Section 8(b) of the Act.

(d) Included in this Part 4 and in Part 6 of this subtitle are provisions to give effect to the amendments mentioned in this section.

§ 4.106 [Reserved]

Agencies Whose Contracts May Be Covered

§ 4.107 Federal contracts.

(a) Section 2(a) of the Act covers contracts (and any bid specification therefor) "entered into by the United States" and section 2(b) applies to contracts entered into "with the Federal Government." Within the meaning of these provisions, contracts entered into by the United States and contracts with the Federal Government include generally all contracts to which any agency or instrumentality of the U.S. Government becomes a party pursuant to authority derived from the Constitution and laws of the United States. The Act does not authorize any distinction in this respect between such agencies and instrumentalities on the basis of their inclusion in or independence from the executive, legislative, or judicial branches of the Government, the fact that they may be corporate in form, or the fact that payment for the contract services is not made from appropriated funds. Thus,

contracts of wholly owned Government corporations, such as the Postal Service, and those of nonappropriated fund instrumentalities under the jurisdiction of the Armed Forces, or of other Federal agencies, such as Federal Reserve Banks, are included among those subject to the general coverage of the Act. (*Brinks, Inc. v. Board of Governors of the Federal Reserve System*, 466 F. Supp. 116 (D DC 1979); 43 Att'y. Gen. Ops. — (September 26, 1978).)

Contracts with the Federal Government and contracts entered into "by the United States" within the meaning of the Act do not, however, include contracts for services entered into on their own behalf by agencies or instrumentalities of other Governments within the United States, such as those of the several States and their political subdivisions, or of Puerto Rico, the Virgin Islands, Guam, or American Samoa.

(b) Where a Federal agency exercises its contracting authority to procure services desired by the Government, the method of procurement utilized by the contracting agency is not controlling in determining coverage of the contract as one entered into by the United States. Such contracts may be entered into by the United States either through a direct award by a Federal agency or through the exercise by another agency (whether governmental or private) of authority granted to it to procure services for or on behalf of a Federal agency. Thus, sometimes authority to enter into service contracts of the character described in the Act for and on behalf of the Government and on a cost-reimbursable basis may be delegated, for the convenience of the contracting agency, to a prime contractor which has the responsibility for all work to be done in connection with the operation and management of a Federal plant, installation, facility, or program, together with the legal authority to act as agency for and on behalf of the Government and to obligate Government funds in the procurement of all services and supplies necessary to carry out the entire program of operation. The contracts entered into by such a prime contractor with secondary contractors for and on behalf of the Federal agency pursuant to such delegated authority, which have such services as their principal purpose, are deemed to be contracts entered into by the United States and contracts with the Federal Government within the meaning of the Act. However, service contracts entered into by State or local public bodies with purveyors of services are not deemed to be entered into by the United States merely because such

services are paid for with funds of the public body which have been received from the Federal Government as a grant under a Federal program. For example, a contract entered into by a municipal housing authority for tree trimming, tree removal, and landscaping for an urban renewal project financed by Federal funds is not a contract entered into by the United States and is not covered by the Service Contract Act. Similarly, contracts let under the Medicaid program which are financed by Federally-assisted grants to the States, and contracts which provide for insurance benefits to a third party, under the Medicare program are not subject to the Act.

§ 4.108 District of Columbia contracts.

Section 2(a) of the Act covers contracts (and any bid specification therefor) in excess of \$2,500 which are "entered into by the * * * District of Columbia." The contracts of all agencies and instrumentalities which procure contract services for or on behalf of the District or under the authority of the District Government are contracts entered into by the District of Columbia within the meaning of this provision. Such contracts are also considered contracts entered into with the Federal Government or the United States within the meaning of section 2(b), section 5, and the other provisions of the Act. The legislative history indicates no intent to distinguish District of Columbia contracts from the other contracts made subject to the Act, and traditionally, under other statutes, District Government contracts have been made subject to the same labor standards provisions as contracts of other agencies and instrumentalities of the United States.

§ 4.109 [Reserved]

Covered Contracts Generally

§ 4.110 What contracts are covered.

(a) The Act covers service contracts of the Federal agencies described in §§ 4.107-4.108. Except as otherwise specifically provided (see §§ 4.115 et seq.), all such contracts, the principal purpose of which is to furnish services in the United States through the use of service employees, are subject to its terms. This is true of contracts entered into by such agencies with States or their political subdivisions, as well as such contracts entered into with private employers. Contracts between a Federal or District of Columbia agency and another such agency are not within the purview of the Act; however, "subcontracts" awarded under "prime contracts" between the Small Business

Administration and another Federal agency pursuant to various preferential set-aside programs, such as the 8(a) program, are covered by the Act. It makes no difference in the coverage of a contract whether the contract services are procured through negotiation or through advertising for bids. Also, the mere fact that an agreement is not reduced to writing does not mean that the contract is not within the coverage of the Act. The amount of the contract is not determinative of the Act's coverage, although the requirements are different for contracts in excess of \$2,500 and for contracts of a lesser amount. The Act is applicable to the contract if the principal purpose of the contract is to furnish services, if such services are to be furnished in the United States, and if service employees will be used in providing such services. These elements of coverage will be discussed separately in the following sections.

(b) *"Contract" as including "any bid specification"*. The Act, by its express terms, applies to "every contract (and any bid specification therefor) * * * the principal purpose of which is to furnish services in the United States through the use of service employees". Thus, as noted in subsequent sections discussing the application of the Act to particular contracts, the Act's provisions may be applicable to separate specifications for services in a contract but not to other contract specifications such as construction or supply specifications. Accordingly, except where otherwise noted, the term "contract" as used in this part shall be deemed to include any contract subject wholly or in part to the provisions of the Act. (See § 4.1a(e).)

§ 4.111 Contracts "to furnish services."

(a) *"Principal purpose" as criterion*. Under its terms, the Act applies to a "contract (and any bid specification therefor) * * * the principal purpose of which is to furnish services * * *". The principal purpose criterion applies only in determining whether a contract or bid specification is for services. Covered contracts need not be performed "principally in the United States" or "principally through the use of service employees." (See §§ 4.112 and 4.113.) If the principal purpose is to provide something other than services of the character contemplated by the Act and any such services which may be performed are only incidental to the performance of a contract or bid specification for another purpose, the Act does not apply. However, as will be seen by examining the illustrative examples of covered contracts in §§ 4.130 et seq., no hard and fast rule can be laid down as to the precise

meaning of the term "principal purpose". This remedial Act is intended to be applied to a wide variety of contracts, and the Act does not define or limit the types of services which may be contracted for under a contract the principal purpose of which is to furnish services. Further, the nomenclature, type, or particular form of contract used by procurement agencies is not determinative of coverage. Whether the principal purpose of a particular contract is the furnishing of services through the use of service employees is largely a question to be determined on the basis of all the facts in each particular case. Even where tangible items of substantial value are important elements of the subject matter of the contract, the facts may show that they are of secondary import to the furnishing of services in the particular case. This principle is illustrated by the examples set forth in § 4.131.

(b) *Determining whether a contract is for "services", generally*. Except indirectly through the definition of "service employee" the Act does not define, or limit, the types of "services" which may be contracted for under a contract "the principal purpose of which is to furnish services". As stated in the congressional committee reports on the legislation, the types of service contracts covered by its provisions are varied. Among the examples cited are contracts for laundry and dry cleaning, for transportation of the mail, for custodial, janitorial, or guard service, for packing and crating, for food service, and for miscellaneous housekeeping services. Covered contracts for services would also include those for other types of services which may be performed through the use of the various classes of service employees included in the definition in section 8(b) of the Act (see § 4.113). Examples of some such contracts are set forth in §§ 4.130 et seq. In determining questions of contract coverage, due regard must be given to the apparent legislative intent to include generally as contracts for "services" those contracts which have as their principal purpose the procurement of something other than the construction activity described in the Davis-Bacon Act or the materials, supplies, articles, and equipment described in the Walsh-Healey Act. The Committee reports in both the House and Senate, and statements made on the floor of the House, took note of the labor standards protections afforded by these two Acts to employees engaged in the performance of construction and supply contracts and observed: "The service contract is now the only remaining

category of Federal contracts to which no labor standards protections apply" (H. Rept. 948, 89th Cong., 1st Sess., p. 1; see also S. Rept. 798, 89th Cong., 1st Sess., p. 1; daily Congressional Record Sept. 20, 1965, p. 23497). A similar understanding of contracts principally for "services" as embracing contracts other than those for construction or supplies is reflected in the statement of President Johnson upon signing the Act (1 Weekly Compilation of Presidential Documents, p. 428).

§ 4.112 Contracts to furnish services "in the United States."

(a) The Act covers contract services furnished "in the United States, including" any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, Outer Continental Shelf lands as defined in the Outer Continental Shelf Lands Act, American Samoa, Guam, Wake Islands, Eniwetok Atoll, Kwajalein Atoll and Johnston Island. The definition expressly excludes any other territory under the jurisdiction of the United States and any United States base or possession within a foreign country. Services to be performed on a vessel operating exclusively in international or foreign waters outside the geographic areas named in section 8(d) would not be services furnished "in the United States" within the meaning of the Act.

(b) A service contract to be performed in its entirety outside the geographic limits of the United States as thus defined is not covered and is not subject to the labor standards of the Act. However, if a service contract is to be performed in part within and in part without these geographic limits, the stipulations required by § 4.6 or § 4.7, as appropriate, must be included in the invitation for bids or negotiation documents and in the contract, and the labor standards must be observed with respect to that part of the contract services that is performed within these geographic limits. In such a case, the requirements of the Act and of the contract clauses will not be applicable to the services furnished outside the United States.

§ 4.113 Contracts to furnish services "through the use of service employees."

(a) *Use of "service employees" in a contract performance*. (1) As indicated in § 4.110, the Act covers service contracts only where "service employees" will be used in performing the services which it is the purpose of the contract to procure. A service contract otherwise subject to the Act ordinarily will meet this condition if any of the services which it is the principal

purpose of the contract to obtain will be furnished through the use of any service employee or employees. Even where it is contemplated that the services (of the kind performed by service employees) will be performed individually by the contractor, the contract cannot be considered outside the reach of the Act unless it is known in advance that the contractor or any subcontractor will in no event use any service employee during the term of the contract in furnishing the services called for. If the contracting officer knows when advertising for bids or concluding negotiations that no such employee will be used by the contractor in any event in providing the contract services, the Act will not be deemed applicable to the contract and the contract clauses required by § 4.6 or § 4.7 may be omitted. The fact that the required services will be performed by municipal employees or employees of a State would not remove the contract from the purview of the Act, as this Act does not contain any exemption for contracts performed by such employees. Also as discussed in subparagraph (2) of this paragraph where the services the Government wants under the contract are of a type that will require the use of service employees as defined in section 8(b) of the Act, the contract is not taken out of the purview of the Act by the fact that the manner in which the services of such employees are performed will be subject to the continuing overall supervision of professional personnel to whom the Act does not apply.

(2) The coverage of the Act does not extend, however, to contracts which have as their principal purpose the procurement of a type of service in the furnishing of which no service employees will be used. A contract for medical services by professional medical personnel is an example of such a contract. So are other contracts under which the desired services called for by the Government are to be performed exclusively by bona fide executive, administrative, or professional personnel as defined in Part 541 of this title (see paragraph (b) of this section).

(3)(i) In addition to the types of contracts discussed in subparagraph (2) of this part, the Department does not require application of the Act to any contract for professional services which is performed essentially by professional employees, with the use of service employees being only a minor factor in the performance of the contract. This tolerance does not extend to a contract for professional services which may involve the use of service employees to a significant or substantial extent even

though there is some use of professional employees in the performance of the contract. This tolerance is issued pursuant to section 4(b) of the Act. It has been found to be necessary and proper in the public interest and to be in accord with the remedial purpose of the Act.

(ii) In applying this tolerance, if service employees constitute less than 10 percent of the total projected employment or staff years under a contract, the Act will not be applied to such contract. If service employees constitute 20 percent or more of the total projected employment or staff years under the contract, the Act will be required to be applied, since this would clearly be a significant use of service employees. Where the projected use of service employees is between 10 and 20 percent, the Department of Labor should be consulted, since such situations require consideration of other factors such as the nature of the contract work, the type of work performed by service employees, how necessary the work is to contract performance, the amount of contract work performed by service employees vis-a-vis professional employees, and the total number of service employees employed on the contract.

(4) Under these principles, the Act applies to many contracts for research and development, statistical surveys, engineering research and designing, computer services, etc., because the contracts may involve the use of a significant number of service employees. Laboratory technicians, interviewers, draftsmen, computer operators, and data entry personnel are a few examples of the classes of service employees that may be employed on such contracts. While the work of such service employees may be performed under the supervision and direction of professional personnel and the final analysis and reporting may be performed by professionals, nevertheless, the work performed by the service employees is a significant and important part of the overall contract requirements.

(b) "Service employees" defined. In determining whether or not any of the contract services will be performed by service employees, the definition of "service employee" in section 8(b) of the Act is controlling. It provides:

The term "service employee" means any person engaged in the performance of a contract entered into by the United States and not exempted under section 7, whether negotiated or advertised, the principal purpose of which is to furnish services in the United States (other than any person employed in a bona fide executive, administrative, or professional capacity, as

those terms are defined in part 541 of title 29, Code of Federal Regulations, as of July 30, 1976, and any subsequent revision of those regulations); and shall include all such persons regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

It will be noted that the definition expressly excludes those employees who are employed in a bona fide executive, administrative, or professional capacity as defined in Part 541 of this title and as discussed further in § 4.158. Some of the specific types of service employees who may be employed on service contracts are noted in other sections which discuss the application of the Act to employees.

§ 4.114 Subcontracts.

(a) "Contractor" as including "subcontractor." Except where otherwise noted or where the term "Government prime contractor" is used, the term "contractor" as used in this Part 4 shall be deemed to include a subcontractor. The term "contractor" as used in the contract clauses required by Subpart A in any subcontract under a covered contract shall be deemed to refer to the subcontractor, or, if in a subcontract entered into by such a subcontractor, shall be deemed to refer to the lower level subcontractor. (See § 4.1a(f).)

(b) *Liability of Prime Contractor.* When a contractor undertakes a contract subject to the Act, the contractor agrees to assume the obligation that the Act's labor standards will be observed in furnishing the required services. This obligation may not be relieved by shifting all or part of the work to another, and the prime contractor is jointly and severally liable with any subcontractor for any acts, omissions, or underpayments on the part of a subcontractor which would constitute a violation of the prime contract. The prime contractor is required to include the prescribed contract clauses (§§ 4.6-4.7) and applicable wage determination in all subcontracts and the appropriate enforcement sanctions provided under the Act may be invoked against both the prime contractor and the subcontractor in the event of failure to comply with any of the Act's requirements.

Specific Exclusions

§ 4.115 Exemptions and exceptions generally.

(a) The Act, in section 7, specifically excludes from its coverage certain contracts and work which might otherwise come within its terms as procurements the principal purpose of

which is to furnish services through the use of service employees.

(b) The statutory exemptions in section 7 of the Act are as follows:

(1) Any contract of the United States or District of Columbia for construction, alteration, and/or repair, including painting and decorating of public buildings or public works;

(2) Any work required to be done in accordance with the provisions of the Walsh-Healy Public Contracts Act (49 Stat. 2036);

(3) Any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line, or oil or gas pipeline where published tariff rates are in effect;

(4) Any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934;

(5) Any contract for public utility services, including electric light and power, water, steam, and gas;

(6) Any employment contract providing for direct services to a Federal agency by an individual or individuals;

(7) Any contract with the Post Office Department, (now the U.S. Postal Service) the principal purpose of which is the operation of postal contract stations.

§ 4.116 Contracts for construction activity.

(a) *General scope of exemption.* The Act, in paragraph (1) of section 7, exempts from its provisions "any contract of the United States or District of Columbia for construction, alteration and/or repair, including painting and decorating of public buildings or public works." This language corresponds to the language used in the Davis-Bacon Act to describe its coverage (40 U.S.C. 276a). The legislative history of the McNamara-O'Hara Service Contract Act indicates that the purpose of the provision is to avoid overlapping coverage of the two acts by excluding from the application of the McNamara-O'Hara Act those contracts (and any bid specification therefor) to which the Davis-Bacon Act is applicable and in the performance of which the labor standards of that Act are intended to govern the compensation payable to the employees of contractors and subcontractors on the work. (See H. Rept. 798, pp. 2, 5, and H. Rept. 948, pp. 1, 5, also Hearing, Special Subcommittee on Labor, House Committee on Education and Labor, p. 9 (89th Cong., 1st sess.)) The intent of section 7(1) is simply to exclude from the provisions of the Act those construction contracts which involve the employment of persons whose wage rates and fringe

benefits are determinable under the Davis-Bacon Act.

(b) *Contracts not within exemption.* Section 7(1) does not exempt contracts which, for purposes of the Davis-Bacon Act, are not considered to be of the character described by the corresponding language in that Act, and to which the provisions of the Davis-Bacon Act are therefore not applied. Such contracts are accordingly subject to the McNamara-O'Hara Act where their principal purpose is to furnish services in the United States through the use of service employees. For example, a contract for clearing timber or brush from land or for the demolition or dismantling of buildings or other structures located thereon may be a contract for construction activity subject to the Davis-Bacon Act where it appears that the clearing of the site is to be followed by the construction of a public building or public work at the same location. If, however, no further construction activity at the site is contemplated the Davis-Bacon Act is considered inapplicable to such clearing, demolition, or dismantling work. In such event, the exemption in section 7(1) of the McNamara-O'Hara Act has no application and the contract will be subject to the Act in accordance with its general coverage provisions. It should be noted that the fact that a contract may be labeled as one for the sale and removal of property, such as salvage material, does not negate coverage under the Act even though title to the removable property passes to the contractor. While the value of the property being sold in relation to the services performed under the contract is a factor to be considered in determining coverage, the principal purpose of removal, dismantling, and demolition contracts is to furnish services through the use of service employees and thus these contracts are subject to the Act. (See also § 4.131.)

(c) *Partially exempt contracts.* (1) Instances may arise in which, for the convenience of the Government, instead of awarding separate contracts for construction work subject to the Davis-Bacon Act and for services of a different type to be performed by service employees, the contracting officer may include separate specifications for each type of work in a single contract calling for the performance of both types of work. For example, a contracting agency may invite bids for the installation of a plumbing system or for the installation of a security alarm system in a public building and for the maintenance of the system for one year, under separate bid specifications. In such a case, the

exemption provided by section 7(1) will be deemed applicable only to that portion of the contract which calls for construction activity subject to the Davis-Bacon Act. The contract documents are required to contain the clauses prescribed by § 4.6 for application to the contract obligation to furnish services through the use of service employees, and the provisions of the McNamara-O'Hara Act will apply to that portion of the contract.

(2) *Supply, services, or maintenance contracts involving construction work.* The provisions of both the Davis-Bacon Act and the Service Contract Act would generally apply to contracts involving construction and service work. The exemption provided by section 7(1) of the Act would be applicable to construction contract work in such hybrid contracts where

(i) The contract contains specific requirements for substantial amounts of construction, reconstruction, alteration, or repair work (hereinafter referred to as construction) or it is ascertainable that a substantial amount of construction work will be necessary for the performance of the contract (the word "substantial" relates to the type and quantity of construction work to be performed and not merely to the total value of construction work (whether in absolute dollars or cost percentages) as compared to the total value of the contract); and

(ii) The construction work is physically or functionally separate from, and as a practical matter is capable of being performed on a segregated basis from, the other work called for by the contract.

§ 4.117 Work subject to requirements of Walsh-Healey Act (Reserved)

§ 4.118 Contracts for carriage subject to published tariff rates.

The Act, in paragraph (3) of section 7, exempts from its provisions "any contract for the carriage of freight or personnel by vessel, airplane, bus, truck, express, railway line or oil or gas pipeline where published tariff rates are in effect". In order for this exemption to be applicable, the contract must be for such carriage by a common carrier described by the terms used. It does not, for example, apply to contracts for taxicab or ambulance service, because taxicab and ambulance companies are not among the common carriers specified by the statute. Also, a contract for transportation service does not come within this exemption unless the service contracted for is actually governed by published tariff rates in effect pursuant to State or Federal law for such carriage.

The contracts excluded from the reach of the Act by this exemption are typically those where there is on file with the Interstate Commerce Commission or an appropriate State or local regulatory body a tariff rate applicable to the transportation involved, and the transportation contract between the Government and the carrier is evidenced by a bill of lading citing the published tariff rate. An administrative exemption has been provided for certain contracts where such carriage is subject to rates covered by section 10721 of the Interstate Commerce Act. See § 4.123(d). It should be noted further that only such contracts for the carriage of "freight or personnel" are exempt. Further, the exemption cannot apply where the contracts are principally for packing, crating, handling, loading, and/or storage of goods, with local drayage constituting an incidental part of the contract work. Also this exemption thus does not exclude any contracts for the transportation of mail from the application of the Act, because the term "freight" does not include the mail. (For an administrative exemption of certain contracts with common carriers for carriage of mail, see § 4.123(d)).

§ 4.119 Contracts for services of communications companies.

The Act, in paragraph (4) of section 7, exempts from its provisions "any contract for the furnishing of services by radio, telephone, telegraph, or cable companies, subject to the Communications Act of 1934." This exemption is applicable to contracts with such companies for communication services regulated under the Communications Act. It does not exempt from the Act any contracts with such companies to furnish any other kinds of services through the use of service employees.

§ 4.120 Contracts for public utility services.

The Act, in paragraph (5) of section 7, exempts from its provisions "any contract for public utility services, including electric light and power, water, steam, and gas." This exemption is applicable to contracts for such services with companies whose rates therefor are regulated under State, local, or Federal law governing operations of public utility enterprises. Contracts entered into with public utility companies to furnish services through the use of service employees, other than those subject to such rate regulation, are not exempt from the Act. Among the contracts included in the exemption would be those between Federal electric

power marketing agencies and investor-owned electric utilities, Rural Electrification Administration cooperatives, municipalities and State agencies engaged in the transmission and sale of electric power and energy.

(See H. Rept. No. 948, 89th Cong., 1st sess., p. 4)

§ 4.121 Contracts for individual services.

The Act, in paragraph (6) of section 7, exempts from its provisions "any employment contract providing for direct services to a Federal agency by an individual or individuals." This exemption, which applies only to an "employment contract" for "direct services," makes it clear that the Act's application to Federal contracts for services is intended to be limited to service contracts entered into with independent contractors. If a contract to furnish services (to be performed by a service employee as defined in the Act) provides that they will be furnished directly to the Federal agency by the individual under conditions or circumstances which will make him an employee of the agency in providing the contract service, the exemption applies and the contract will not be subject to the Act's provisions. The exemption does not exclude from the Act any contract for services of the kind performed by service employees which is entered into with an independent contractor whose individual services will be used in performing the contract, but as noted earlier in § 4.113, such a contract would be outside the general coverage of the Act if only the contractor's individual services would be furnished and no service employee would in any event be used in its performance.

§ 4.122 Contracts for operation of postal contract stations.

The Act, in paragraph (7) of section 7, exempts from its provisions "any contract with the Post Office Department, [now the U.S. Postal Service], the principal purpose of which is the operation of postal contract stations." The exemption is limited to postal service contracts having the operation of such stations as their principal purpose. A provision of the legislation which would also have exempted contracts with the U.S. Postal Service having as their principal purpose the transportation, handling, or delivery of the mails was eliminated from the bill during its consideration by the House Committee on Education and Labor (H. Rept. 948, p. 1, 89th Cong., 1st sess.).

§ 4.123 Administrative limitations, variances, tolerances, and exemptions.

(a) *Authority of the Secretary.* Section 4(b) of the Act as amended in 1972 authorizes the Secretary to "provide such reasonable limitations" and to "make such rules and regulations allowing reasonable variations, tolerances, and exemptions to and from any or all provisions of this Act (other than § 10), but only in special circumstances where he determines that such limitation, variation, tolerances, or exemption is necessary and proper in the public interest or to avoid the serious impairment of Government business, and is in accord with the remedial purpose of this Act to protect prevailing labor standards." This authority is similar to that vested in the Secretary under section 6 of the Walsh-Healey Public Contracts Act (41 U.S.C. 40) and under section 105 of the Contract Work Hours and Safety Standards Act (40 U.S.C. 331).

(b) *Administrative action under section 4(b) of the Act.* The authority conferred on the Secretary by section 4(b) of the Act will be exercised with due regard to the remedial purpose of the statute to protect prevailing labor standards and to avoid the undercutting of such standards which could result from the award of Government work to contractors who will not observe such standards, and whose saving in labor cost therefrom enables them to offer a lower price to the Government than can be offered by the fair employers who maintain the prevailing standards. Administrative action consistent with this statutory purpose may be taken under section 4(b) with or without a request therefor, when found necessary and proper in accordance with the statutory standards. No formal procedures have been prescribed for requesting such action. However, a request for exemption from the Act's provisions will be granted only upon a strong and affirmative showing that it is necessary and proper in the public interest or to avoid serious impairment of Government business, and is in accord with the remedial purpose of the Act to protect prevailing labor standards. If the request for administrative action under section 4(b) is not made by the headquarters office of the contracting agency to which the contract services are to be provided, the views of such office on the matter should be obtained and submitted with the request or the contracting officer may forward such a request through channels to the agency headquarters for submission with the latter's views to the Administrator of the Wage and Hour

Division, Department of Labor, whenever any wage payment issues are involved. Any request relating to an occupational safety or health issue shall be submitted to the Assistant Secretary for Occupational Safety and Health, Department of Labor.

(c) *Documentation of official action under section 4(b).* All papers and documents made a part of the official record of administrative action pursuant to section 4(b) of the Act are available for public inspection in accordance with the regulations in 29 CFR Part 70. Limitations, variations, tolerances and exemptions of general applicability and legal effect promulgated pursuant to such authority are published in the *Federal Register* and made a part of the rules incorporated in this Part 4. For convenience in use of the rules, they are generally set forth in the sections of this part covering the subject matter to which they relate. (See, for example, the exemption provided in §§ 4.5(b), 4.6(o), and the limitations set forth in §§ 4.115 et seq.) Any rules that are promulgated under section 4(b) of the Act relating to subject matter not dealt with elsewhere in this Part 4 will be set forth immediately following this paragraph.

(d) In addition to the statutory exemptions in § 7 of the Act (see § 4.115(c)), the following types of contracts have been exempted from all the provisions of the Service Contract Act of 1965, pursuant to section 4(b) of the Act, which exemptions the Secretary of Labor found to be necessary and proper in the public interest or to avoid serious impairment of the conduct of Government business.

(1) Contracts entered into by the United States with common carriers for the carriage of mail by rail, air (except air star routes), bus, and ocean vessel, where such carriage is performed on regularly scheduled runs of the trains, airplanes, buses, and vessels over regularly established routes and accounts for an insubstantial portion of the revenue therefrom.

(2) Any contract entered into by the U.S. Postal Service with an individual owner-operator for mail service where it is not contemplated at the time the contract is made that such owner-operator will hire any service employee to perform the services under the contract except for short periods of vacation time or for unexpected contingencies or emergency situations such as illness, or accident.

(3) Contracts for the carriage of freight or personnel where such carriage is subject to rates covered by section 10721 of the Interstate Commerce Act.

§§ 4.124—4.129 [Reserved]

Particular Application of Contract Coverage Principles

§ 4.130 Types of covered service contracts illustrated.

(a) The types of contracts, the principal purpose of which is to furnish services through the use of service employees, are too numerous and varied to permit an exhaustive listing. The following list is illustrative, however, of the types of services called for by such contracts that have been found to come within the coverage of the Act. Other examples of covered contracts are discussed in other sections of this subpart.

- (1) Aerial spraying
- (2) Aerial reconnaissance for fire detection
- (3) Ambulance service
- (4) Barber and beauty shop services
- (5) Cafeteria and food service
- (6) Carpet laying (other than part of construction) and cleaning
- (7) Cataloging services
- (8) Chemical testing and analysis
- (9) Clothing alteration and repair
- (10) Computer services
- (11) Concessionaire services
- (12) Custodial, janitorial, and housekeeping services
- (13) Data collection, processing, and/or analysis services
- (14) Demolition, dismantling and/or removal of buildings and other real property (other than part of construction)
- (15) Drafting and illustrating
- (16) Electronic equipment maintenance and operation and engineering support services
- (17) Exploratory drilling (other than part of construction)
- (18) Film processing
- (19) Fire fighting and protection
- (20) Fueling services
- (21) Furniture repair and rehabilitation
- (22) Geological field surveys and testing
- (23) Grounds maintenance
- (24) Guard and watchman security service
- (25) Inventory services
- (26) Key punching and key verifying contracts
- (27) Laboratory analysis services
- (28) Landscaping (other than part of construction)
- (29) Laundry and dry cleaning
- (30) Linen supply services
- (31) Lodging and/or meals
- (32) Mail hauling
- (33) Mailing and addressing services
- (34) Maintenance and repair of all types of equipment, e.g., aircraft, engines, electrical motors, vehicles, and automated data processing, electronic,

- telecommunications, office and related business, and construction equipment
- (35) Mess attendant services
 - (36) Mortuary services
 - (37) Motor pool operation
 - (38) Nursing home services
 - (39) Operation, maintenance, or logistic support of a Federal facility
 - (40) Packing and crating
 - (41) Parking services
 - (42) Pest control
 - (43) Property management
 - (44) Snow removal
 - (45) Stenographic reporting
 - (46) Support services at military installations
 - (47) Surveying and mapping services (preliminary but not directly related to construction)
 - (48) Taxicab services
 - (49) Telephone and field interview services
 - (50) Timber removal/sale contracts
 - (51) Tire and tube repairs
 - (52) Transporting property or personnel (except as explained in § 4.118)
 - (53) Trash and garbage removal
 - (54) Vending machine services
 - (55) Visual and graphic arts
 - (56) Warehousing or storage
- § 4.131 *Furnishing services involving more than use of labor.*
- (a) If the principal purpose of a contract is to furnish services in the performance of which service employees will be used, the Act will apply to the contract, in the absence of an exemption, even though the use or furnishing of nonlabor items may be an important element in the furnishing of the services called for by its terms. The Act is concerned with protecting the labor standards of workers engaged in performing such contracts, and is applicable if the statutory coverage test is met, regardless of the form in which the contract is drafted. The proportion of the labor cost to the total cost of the contract and the necessity of furnishing or receiving tangible nonlabor items in performing the contract obligations will be considered but are not necessarily determinative. A procurement that requires tangible items to be supplied to the Government or the contractor as a part of the service furnished is covered by the Act so long as the facts show that the contract is chiefly for services, and that the furnishing of tangible items is of secondary importance.
- (b) Some examples of covered contracts illustrating these principles may be helpful. One such example is a contract for the maintenance and repair of typewriters. Such a contract may require the contractor to furnish typewriter parts, as the need arises, in

performing the contract services. Since this does not change the principal purpose of the contract, which is to furnish the maintenance and repair services through the use of service employees, the contract remains subject to the Act.

(c) Another example of the application of the above principle is a contract for the recurrent supply to a Government agency of freshly laundered items on a rental basis. It is plain from the legislative history that such a contract is typical of those intended to be covered by the Act. S. Rept. 798, 89th Cong., 1st Sess., p. 2; H. Rept. 948, 89th Cong., 1st Sess., p. 2. Although tangible items owned by the contractor are provided on a rental basis for the use of the Government, the service furnished by the contractor in making them available for such use when and where they are needed, through the use of service employees who launder and deliver them, is the principal purpose of the contract.

(d) Similarly, a contract in the form of rental of equipment with operators for the plowing and reseeded of a park area is a service contract. The Act applies to it because its principal purpose is the service of plowing and reseeded, which will be performed by service employees, although as a necessary incident the contractor is required to furnish equipment. For like reasons the contracts for aerial spraying and aerial reconnaissance listed in § 4.130 are covered, even though the use of airplanes, an expensive item of equipment, is essential in performing such services. In general, contracts under which the contractor agrees to provide the Government with vehicles or equipment on a rental basis with drivers or operators for the purpose of furnishing services are covered by the Act. Such contracts are not considered contracts for furnishing equipment within the meaning of the Walsh-Healey Public Contracts Act. On the other hand, contracts under which the contractor provides equipment with operators for the purpose of construction of a public building or public work, such as road resurfacing or dike repair, even where the work is performed under the supervision of Government employees, would be within the exemption in section 7(1) of the Act as contracts for construction subject to the Davis-Bacon Act. (See § 4.116.)

(e) Contracts for data collection, statistical surveys, computer services, and the like are within the general coverage of the Act even though the contractor may be required to furnish such tangible items as written reports or

computer printouts, since items of this nature are considered to be of secondary importance to the services which it is the principal purpose of the contract to procure.

(f) Contracts under which the contractor receives tangible items from the Government in return for furnishing services (which items are in lieu of or in addition to monetary consideration granted by either party) are covered by the Act where the facts show that the furnishing of such services is the principal purpose of the contracts. For example, so-called "timber sales" contracts are subject to the Act where removal of trees is accomplished for the purpose of forest management, such as removal of diseased or damaged trees; to open up the forest for public use, such as camping; or for similar services. Similarly, even where the removal of trees is not accomplished for the purpose of forest management or some other service, such contracts generally contain service specifications which are subject to the act, such as building of temporary roads, firefighting and control, erosion control, slash removal and trimming, and removal of diseased or injured trees. Under these contracts, the fact that a contractor will receive a substantial amount of timber is of secondary importance to the services which it is the principal purpose of the Government contract (or specification) to procure. The same principle applies with respect to so-called property removal or disposal contracts which involve demolition of buildings or other structures.

§ 4.132 Services and other items to be furnished under a single contract.

If the principal purpose of a contract or bid specification (i.e., a line item in a bid or contract) is to furnish services through the use of service employees within the meaning of the Act, the contract to furnish such services is not removed from the Act's coverage merely because, as a matter of convenience in procurement, it is combined in a single contract document with specifications for the procurement of different or unrelated items. For example, a contracting agency may invite bids for supplying a quantity of new typewriters and for the maintenance and repair of the typewriters under separate bid specifications. The principal purpose of the latter, but not the former, would be the furnishing of services through the use of service employees; however, the specifications for each might be included in a single contract with a typewriter company for the convenience of the parties. In such a case, the contract obligation to furnish the

maintenance and repair services would be subject to the provisions of the Act. The "principal purpose" test would be applicable to the specification for such services rather than to the combined contract. The Act would not apply in such case to the contract obligation to furnish new typewriters, although its performance would be subject to the provisions of the Walsh-Healey Public Contracts Act if the amount was in excess of \$10,000. With respect to contracts which contain separate specifications for the furnishing of services and construction activity, see § 4.116(c).

§ 4.133 [Reserved]

§ 4.134 Contracts outside the Act's coverage.

(a) Contracts entered into by agencies other than those of the Federal Government or the District of Columbia as described in §§ 4.107-4.108 are not within the purview of the Act. Thus, the Act does not cover service contracts entered into with any agencies of Puerto Rico, the Virgin Islands, American Samoa, or Guam acting in behalf of their respective local governments. Similarly, it does not cover service contracts entered into by agencies of States or local public bodies, not acting as agents for or on behalf of the United States or the District of Columbia, even though Federal financial assistance may be provided for such contracts under Federal law or the terms and conditions specified in Federal law may govern the award and operation of the contract.

(b) Further, as already noted in §§ 4.111-4.113, the Act does not apply to Government contracts or bid specifications which do not have as their principal purpose the furnishing of services, or which call for no services to be furnished within the United States or through the use of service employees as those terms are defined in the Act. Clearly outside the Act's coverage for these reasons are such contracts as those for the purchase of tangible products which the Government needs (e.g. vehicles, office equipment, and supplies), for the logistic support of an air base in a foreign country, or for the services of a lawyer to examine the title to land. Similarly, where the Government contracts for a lease of building space for Government occupancy and the building owner furnishes general janitorial and other building services on an incidental basis through the use of service employees, the leasing of the space rather than the furnishing of the building services is the principal purpose of the contract, and the Act does not apply. However, if the

contract contains a separate line item or items which requires the contractor to furnish specified levels and frequencies of janitorial, security, or other maintenance services, the requirement for such services is considered to be a separate specification the principal purpose of which is the furnishing of services, and as set forth in § 4.132, the Act would apply to such specification. Another type of contract which is outside the coverage of the Act because it is not for the principal purpose of furnishing services may be illustrated by a contract for the rental of parking space under which the Government agency is simply given a lease or license to use the contractor's real property. Such a contract is to be distinguished from contracts for the storage of vehicles which are delivered into the possession or custody of the contractor, who will provide the required services including the parking or retrieval of the vehicles.

(c) There are a number of types of contracts which, while outside the Act's coverage in the usual case, may be subject to its provisions under the conditions and circumstances of a particular procurement, because these may be such as to require a different view of the principal purpose of the contract. Thus, the ordinary contract for the recapping of tires would have as its principal purpose the manufacture and furnishing of rebuilt tires for the Government rather than the furnishing of services through the use of service employees, and thus would be outside the Act's coverage. Similarly, contracts calling for printing, reproduction, and duplicating ordinarily would appear to have as their principal purpose the furnishing in quantity of printed, reproduced or duplicated written materials rather than the furnishing of reproduction services through the use of service employees. However, in a particular case, the terms, conditions, and circumstances of the procurement may be such that the facts would show its purpose to be chiefly the furnishing of services (e.g. repair services, typesetting, photocopying, editing, etc.), and where such services require the use of service employees the contract would be subject to the Act unless excluded therefrom for some other reason.

§§ 4.135-4.139 [Reserved]

Determining Amount of Contract

§ 4.140 Significance of contract amount.

As set forth in § 4.104 and in the requirements of §§ 4.6-4.7, the obligations of a contractor with respect to labor standards differ in the case of a covered and nonexempt contract, depending on whether the contract is or

is not in excess of \$2,500. Rules for resolving questions that may arise as to whether a contract is or is not in excess of this figure are set forth in the following sections.

§ 4.141 General criteria for measuring amount.

(a) In general, the contract amount is measured by the consideration agreed to be paid, whether in money or other valuable consideration, in return for the obligations assumed under the contract. Thus, even though a contractor, such as a wrecker entering into a contract with the Government to raze a building on a site which will remain vacant, may not be entitled to receive any money from the Government for such work under his contract or may even agree to pay the Government in return for the right to dispose of the salvaged materials, the contract will be deemed one in excess of \$2,500 if the value of the property obtained by the contractor, less anything he might pay the Government, is in excess of such amount. In addition, concession contracts are considered to be contracts in excess of \$2,500 if the contractor's gross receipts under the contract may exceed \$2,500.

(b) All bids from the same person on the same invitation for bids will constitute a single offer, and the total award to such person will determine the amount involved for purposes of the Act. Where the procurement is made without formal advertising, in arriving at the aggregate amount involved, there must be included all property and services which would properly be grouped together in a single transaction and which would be included in a single advertisement for bids if the procurement were being effected by formal advertising. Therefore, if an agency procures continuing services through the issuance of monthly purchase orders, the amount of the contract for purposes of application of the Act is not measured by the amount of an individual purchase order. In such cases, if the continuing services were procured through formal advertising, the contract term would typically be for one year, and the monthly purchase orders must be grouped together to determine whether the yearly amount may exceed \$2,500. However, a purchase order for services which are not continuing but are performed on a one-time or sporadic basis and which are not performed under a requirements contract, need not be equated to a yearly amount. (See § 4.142(b)). In addition, where an invitation is for services in an amount in excess of \$2,500 and bidders are permitted to bid on a portion of the services not amounting to more than

\$2,500, the amounts of the contracts awarded separately to individual and unrelated bidders will be measured by the portions of the services covered by their respective contracts.

(c) Where a contract is issued in an amount in excess of \$2,500 this amount will govern for purposes of application of the Act even though penalty deductions, deductions for prompt payment, and similar deductions may reduce the amount actually expended by the Government to \$2,500 or less.

§ 4.142 Contracts in an indefinite amount.

(a) Every contract subject to this Act, (and any bid specification therefor) which is indefinite in amount is required to contain the clauses prescribed in § 4.6 for contracts in excess of \$2,500, unless the contracting officer has definite knowledge in advance that the contract will not exceed \$2,500 in any event.

(b) Where contracts or agreements between a Government agency and prospective purveyors of services are negotiated which provide terms and conditions under which services will be furnished through the use of service employees in response to individual purchase orders or calls, if any, which may be issued by the agency during the life of the agreement, these agreements would ordinarily constitute contracts within the intent of the Act under principles judicially established in *United Biscuit Co. v. Wirtz*, 17 WH Cases 146 (C.A.D.C.), a case arising under the Walsh-Healey Public Contracts Act. Such a contract, which may be in the nature of a bilateral option contract and not obligate the Government to order any services or the contractor to furnish any, nevertheless governs any procurement of services that may be made through purchase orders or calls issued under its terms. Since the amount of the contract is indefinite, it is subject to the rule stated in paragraph (a) of this section. The amount of the contract is not determined by the amount of any individual call or purchase order.

Changes in Contract Coverage

§ 4.143 Effects of changes or extensions of contracts, generally.

(a) Sometimes an existing service contract is modified, amended, or extended in such a manner that the changed contract is considered to be a new contract for purposes of the application of the Act's provisions. The general rule with respect to such contracts is that, whenever changes affecting the labor requirements are made in the terms of the contract, the provisions of the Act and the regulations thereunder will apply to the changed

contract in the same manner and to the same extent as they would to a wholly new contract. However, contract modifications or amendments (other than contract extensions) that are unrelated to the labor requirements of a contract will not be deemed to create a new contract for purposes of the Act. In addition, only significant changes related to labor requirements will be considered as creating new contracts. This limitation on the application of the Act has been found to be in accordance with the provisions of section 4(b) of the Act.

(b) Also, whenever the term of an existing contract is extended, pursuant to an option clause or otherwise, so that the contractor furnishes services over an extended period of time, rather than being granted extra time to fulfill his original commitment, the contract extension is considered to be a new contract for purposes of the application of the Act's provisions. All such "new" contracts as discussed above require the insertion of a new or revised wage determination in the contract as provided in § 4.5.

§ 4.144 Contract modifications affecting amount.

Where a contract which was originally issued in an amount not in excess of \$2,500 is later modified so that its amount may exceed that figure, all the provisions of section 2(a) of the Act, and the regulations thereunder are applicable from the date of modification to the date of contract completion. In the event of such modification, the contracting officer will immediately request a wage determination from the Department of Labor and insert the required contract clauses and any wage determination issued into the contract. In the event that a contract for services subject to the Act in excess of \$2,500 is modified so that it cannot exceed \$2,500, compliance with the provisions of section 2(a) of the Act and the contract clauses required thereunder ceases to be an obligation of the contractor when such modification becomes effective.

§ 4.145 Extended term contracts.

(a) Sometimes service contracts are entered into for a term of years; however, their continuation in effect is subject to the appropriation by Congress of funds for each new fiscal year. In such event, for purposes of this Act, a contract shall be deemed entered into at the beginning of each new fiscal year during which the terms of the original contract are made effective by an appropriation for the purpose. In other cases a service contract, entered into for a specified term by a Government

agency, may contain a provision such as an option clause under which the agency may unilaterally extend the contract for a period of the same length or other stipulated period. Since the exercise of the option results in the rendition of services for a new or different period not included in the term for which the contractor is obligated to furnish services or for which the Government is obligated to pay under the original contract in the absence of such action to extend it, the contract for the additional period is a wholly new contract with respect to application of the Act's provisions and the regulations thereunder.

(b) With respect to multi-year service contracts which are not subject to annual appropriations (for example, concession contracts which are funded through the concessionaire's sales, certain research and development contracts which are funded with so-called "no year money" or contracts awarded by instrumentalities of the United States, such as the Federal Reserve Banks, which do not receive appropriated funds), section 4(d) of the Act allows such contracts to be awarded for a period of up to five years on the condition that the multi-year contracts will be amended no less often than once every two years to incorporate any new Service Contract Act wage determination which may be applicable. Accordingly, unless the contracting agency is notified to the contrary (see § 4.4(d)), at the end of the second year and again at the end of the fourth year, etc. such contracts are treated as wholly new contracts for purposes of the application of the Act's provisions and regulations thereunder. The two-year period is considered to begin on the date that the contractor commences performance on the contract (i.e., anniversary date) rather than on the date of contract award.

Period of Coverage

§ 4.146 Contract obligations after award, generally.

A contractor's obligation to observe the provisions of the Act arises on the date the contractor is informed that award of the contract has been made, and not necessarily on the date of formal execution. However, the contractor is required to comply with the provisions of the Act and regulations thereunder only while the employees are performing on the contract, provided the contractor's records make clear the period of such performance. (See also § 4.179.) If employees of the contractor are required by the contract to complete certain preliminary training or testing

prior to the commencement of the contract services, or if there is a phase-in period which allows the new contractor's employees to familiarize themselves with the contract work so as to provide a smooth transition between contractors, the time spent by employees undertaking such training or phase-in work is considered to be hours worked on the contract and must be compensated for even though the principal contract services may not commence until a later date.

§§ 4.147-4.149 [Reserved]

Employees Covered by the Act

§ 4.150 Employee coverage generally.

The Act, in section 2(b), makes it clear that its provisions apply generally to all employees engaged in performing work on a covered contract entered into by the contractor with the Federal Government, regardless of whether they are the contractor's employees or those of any subcontractor under such contract. All service employees who, on or after the date of award, are engaged in working on or in connection with the contract, either in performing the specific services called for by its terms or in performing other duties necessary to the performance of the contract, are thus subject to the Act unless a specific exemption (see §§ 4.115 et seq.) is applicable. All such employees must be paid wages at a rate not less than the minimum wage specified under section 8(a)(1) of the Fair Labor Standards Act (29 U.S.C. 206(a)(1)), as amended. Payment of a higher minimum monetary wage and the furnishing of fringe benefits may be required under the contract, pursuant to the provisions of sections 2(a)(1), (2), and 4(c) of the Act.

§ 4.151 Employees covered by provision of section 2(a).

The provisions of sections 2(a) and 4(c) of the Act prescribe labor standards requirements applicable, except as otherwise specifically provided, to every contract in excess of \$2,500 which is entered into by the United States or the District of Columbia for the principal purpose of furnishing services in the United States through the use of service employees. These provisions apply to all service employees engaged in the performance of such a contract or any subcontract thereunder. The Act, in section 8(b) defines the term "service employee". The general scope of the definition is considered in § 4.113(b) of this subpart.

§ 4.152 Employees subject to prevailing compensation provisions of sections 2(a)(1) and (2) and 4(c).

(a) Under section 2(a)(1) and (2) of the Act, minimum monetary wages and fringe benefits to be paid or furnished the various classes of service employees performing such contract work are determined by the Secretary of Labor or his authorized representative in accordance with prevailing rates and fringe benefits for such employees in the locality or in accordance with the rates contained in a predecessor contractor's collective bargaining agreement, as appropriate, and are required to be specified in such contracts and subcontracts thereunder. All service employees of the classes who actually perform the specific services called for by the contract (e.g., janitors performing on a contract for office cleaning; stenographers performing on a contract for stenographic reporting) are covered by the provisions specifying such minimum monetary wages and fringe benefits for such classes of service employees and must be paid not less than the applicable rate established for the classification(s) of work performed.

(b) The duties which an employee actually performs govern the classification and the rate of pay to which the employee is entitled under the applicable wage determination. Some job classifications listed in an applicable wage determination are descriptive by title and have commonly understood meanings, (e.g., janitors, security guards, pilots, etc.). In such situations, detailed position descriptions may not be included in the wage determination. However, in cases where additional descriptive information is needed to inform users of the scope of duties included in the classification, the wage determination will generally contain detailed position descriptions based on the data source relied upon for the issuance of the wage determination.

(c) Some wage determinations will list a series of classes within a job classification family, e.g., Computer Operators, Class A, B, and C, or Electronic Technicians, Class A, B, and C, or Clerk Typist, Class A and B. Generally, the lowest level listed for a job classification family is considered to be the entry level and establishment of a lower level through conformance (§ 4.6(b)(2)) is not permissible. Likewise, so-called trainee classifications are not permissible and cannot be conformed under § 4.6(b)(2). Helpers in skilled maintenance trades (e.g., electricians, machinists, automobile mechanics, etc.) whose duties constitute, in fact, separate and distinct jobs, may be conformed. However, conformance may not be used

to artificially split or subdivide classifications listed in the wage determination. In other words, conforming procedures may not be used if the work which an employee performs under the contract is within the scope of any classification listed on the wage determination, regardless of job title. Subminimum rates for apprentices, student learners, and handicapped workers are permissible under the conditions discussed in § 4.6(o).

§ 4.153 Inapplicability of prevailing compensation provisions to some employees.

There may be employees used by a contractor or subcontractor in performing a service contract in excess of \$2,500 which is subject to the Act, whose services, although necessary to the performance of the contract, are not subject to minimum monetary wage or fringe benefit provisions contained in the contract pursuant to section 2(a) because such employees are not directly engaged in performing the specified contract services. An example might be a laundry contractor's billing clerk performing billing work with respect to the items laundered. In all such situations, the employees who are necessary to the performance of the contract but not directly engaged in the performance of the specified contract services, are nevertheless subject to the minimum wage provision of section 2(b) (see § 4.150) requiring payment of not less than the minimum wage specified under section 8(a)(1) of the Fair Labor Standards Act to all employees working on a covered contract, unless specifically exempt. However, in situations where minimum monetary wages and fringe benefits for a particular class or classes of service employees actually performing the services called for by the contract have not been specified in the contract because the wage and fringe benefit determination applicable to the contract has been made only for other classes of service employees who will perform the contract work, the employer will be required to pay the monetary wages and fringe benefits which may be specified for such classes of employees pursuant to the conformance procedures provided in § 4.6(b).

§ 4.154 Employees covered by sections 2(a)(3) and (4).

The safety and health standards of section 2(a)(3) and the notice requirements of section 2(a)(4) of the Act (see § 4.183) are applicable, in the absence of a specific exemption, to every service employee engaged by a contractor or subcontractor to furnish

services under a contract subject to section 2(a) of the Act.

§ 4.155 Employee coverage does not depend on form of employment contract.

The Act, in section 8(b), makes it plain that the coverage of service employees depends on whether their work for the contractor or subcontractor on a covered contract is that of a service employee as defined in section 8(b) and not on any contractual relationship that may be alleged to exist between the contractor or subcontractor and such persons. In other words, any person, except those discussed in § 4.156 below, who performs work called for by a contract or that portion of a contract subject to the Act is, per se, a service employee. Thus, for example, a person's alleged status as an "owner-operator" or an "independent contractor" is immaterial in determining coverage under the Act and all such persons performing the work of service employees must be compensated in accordance with the Act's requirements.

§ 4.156 Employees in bona fide executive, administrative, or professional capacity.

The term "service employee" as defined in Section 8(b) of the Act does not include persons employed in a bona fide executive, administrative, or professional capacity as those terms are defined in 29 CFR Part 541. Employees within the definition of service employee who are employed in an executive, administrative, or professional capacity are not excluded from coverage, however, even though they are highly paid, if they fail to meet the tests set forth in 29 CFR Part 541. Thus, such employees as laboratory technicians, draftsmen, and air ambulance pilots, though they require a high level of skill to perform their duties and may meet the salary requirements of the regulations in Part 541 of this title, are ordinarily covered by the Act's provisions because they do not typically meet the other requirements of those regulations.

Subpart D—Compensation Standards

§ 4.159 General minimum wage.

The Act, in section 2(b)(1), provides generally that no contractor or subcontractor under any Federal contract subject to the Act shall pay any employee engaged in performing work on such a contract less than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act. Section 2(a)(1) provides that the minimum monetary wage specified in any such contract exceeding \$2,500 shall in no case be lower than this Fair Labor

Standards Act minimum wage. Section 2(b)(1) is a statutory provision which applies to the contractor or subcontractor without regard to whether it is incorporated in the contract; however, §§ 4.6-4.7 provide for inclusion of its requirements in covered contracts and subcontracts. Because this statutory requirement specifies no fixed monetary wage rate and refers only to the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act, and because its application does not depend on provisions of the contract, any increase in such Fair Labor Standards Act minimum wage during the life of the contract is, on its effective date, also effective to increase the minimum wage payable under section 2(b)(1) to employees engaged in performing work on the contract. The minimum wage rate under section 6(a)(1) of the Fair Labor Standards Act is \$3.10 per hour beginning January 1, 1980, and \$3.35 per hour after December 31, 1980.

§ 4.160 Effect of section 6(e) of the Fair Labor Standards Act.

Contractors and subcontractors performing work on contracts subject to the Service Contract Act are required to pay all employees, including those employees who are not performing work on or in connection with such contracts, not less than the general minimum wage standard provided in section 6(a)(1) of the Fair Labor Standards Act, as amended (Pub. L. 95-151).

§ 4.161 Minimum monetary wages under contracts exceeding \$2,500.

The standards established pursuant to the Act for minimum monetary wages to be paid by contractors and subcontractors under service contracts in excess of \$2,500 to service employees engaged in performance of the contract or subcontract are required to be specified in the contract and in all subcontracts (see § 4.6). Pursuant to the statutory scheme provided by sections 2(a)(1) and 4(c) of the Act, every covered contract (and any bid specification therefor) which is in excess of \$2,500 shall contain a provision specifying the minimum monetary wages to be paid the various classes of service employees engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative in accordance with prevailing rates for such employees in the locality, or, where a collective bargaining agreement applied to the employees of a predecessor contractor, in accordance with the rates for such employees provided for in such agreement; including prospective wage

increases as provided in such agreement as a result of arm's-length negotiations. In no case may such wages be lower than the minimum wage specified under section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended. (For a detailed discussion of the application of section 4(c) of the Act, see § 4.163.) If some or all of the determined wages in a contract fall below the level of the Fair Labor Standards Act minimum by reason of a change in that rate by amendment of the law, these rates become obsolete and the employer is obligated under section 2(b)(1) of the Service Contract Act, to pay the minimum wage rate established by the amendment as of the date it becomes effective. A change in the Fair Labor Standards Act minimum by operation of law would also have the same effect on advertised specifications or negotiations for covered service contracts, i.e., it would make ineffective and would supplant any lower rate or rates included in such specifications or negotiations whether or not determined. However, unless affected by such a change in the Fair Labor Standards Act minimum wage, by contract changes necessitating the insertion of new wage provisions (see §§ 4.143-4.145 or by the requirements of section 4(c) of the Act (see § 4.163), the minimum monetary wage rate specified in the contract for each of the classes of service employees for which wage determinations have been made under section 2(a)(1) will continue to apply throughout the period of contract performance. No change in the obligation of the contractor or subcontractor with respect to minimum monetary wages will result from the mere fact that higher or lower wage rates may be determined to be prevailing for such employees in the locality after the award and before completion of the contract. Such wage determinations are effective for contracts not yet awarded, as provided in § 4.5(a).

§ 4.162 Fringe benefits under contracts exceeding \$2,500.

(a) Pursuant to the statutory scheme provided by sections 2(a)(2) and 4(c) of the Act, every covered contract in excess of \$2,500 shall contain a provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality or, where a collective bargaining agreement applied to the employees of a predecessor contractor, the various classes of service

employees engaged in the performance of the contract or any subcontract must be provided the fringe benefits, including prospective or accrued fringe benefit increases, provided for in such agreement as a result of arm's-length negotiations. (For a detailed discussion of section 4(c) of the Act, see § 4.163.) As provided by section 2(a)(2) of the Act, fringe benefits include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor.

(b) Under this provision, the fringe benefits, if any, which the contractor or subcontractor is required to furnish the service employees engaged in the performance of the contract are specified in the contract documents (see § 4.6). How the contractor may satisfy this obligation is dealt with in §§ 4.170-4.177 of this part. A change in the fringe benefits required by the contract provision will not result from the mere fact that other or additional fringe benefits are determined to be prevailing for such employees in the locality at a time subsequent to the award but before completion of the contract. Such fringe benefit determinations are effective for contracts not yet awarded (see § 4.5(a)), or in the event that changes in an existing contract requiring their insertion for prospective application have occurred (see §§ 4.143-4.145). However, none of the provisions of this subsection may be construed as altering a successor contractor's obligations under section 4(c) of the Act. (See § 4.163.)

§ 4.163 Section 4(c) of the Act.

(a) Section 4(c) of the Act provides that no "contractor or subcontractor under a contract, which succeeds a contract subject to this Act and under which substantially the same services are furnished, shall pay any service employee under such contract less than the wages and fringe benefits, including accrued wages and fringe benefits, and any prospective increases in wages and fringe benefits provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract: Provided, That in any of the

foregoing circumstances such obligations shall not apply if the Secretary finds after a hearing in accordance with regulations adopted by the Secretary that such wages and fringe benefits are substantially at variance with those which prevail for services of a character similar in the locality." Under this provision, the successor contractor's sole obligation is to insure that all service employees are paid no less than the wages and fringe benefits to which such employees would have been entitled if employed under the predecessor's collective bargaining agreement (i.e., irrespective of whether the successor's employees were or were not employed by the predecessor contractor). The obligation of the successor contractor is limited to the wage and fringe benefit requirements of the predecessor's collective bargaining agreement and does not extend to other items such as seniority, grievance procedures, work rules, overtime, etc.

(b) *Section 4(c) is self-executing.* Under section 4(c), a successor contractor is statutorily obligated to pay no less than the wage rates and fringe benefits which the predecessor contractor paid pursuant to a collective bargaining agreement. This is a direct statutory obligation and requirement placed on the successor contractor by section 4(c) and is not contingent or dependent upon the issuance or incorporation in the contract of a wage determination based on the predecessor contractor's collective bargaining agreement. Pursuant to section 4(b) of the Act, a variation has been granted which limits the self-executing application of section 4(c) in the circumstances and under the conditions described in § 4.1b(b) of this part. It must be emphasized, however, that the variation in § 4.1b(b) is applicable only if the contracting officer has given both the incumbent (predecessor) contractor and the employees' collective bargaining representative notification at least 30 days in advance of any estimated procurement date.

(c) *Variance hearings.* The regulations and procedures for hearings pursuant to section 4(c) of the Act are contained in § 4.10 of Subpart A and Part 6 of this title. If, as the result of such hearing, some or all of the wage rate and/or fringe benefit provisions of a predecessor contractor's collective bargaining agreement are found to be substantially at variance with the wage rates and/or fringe benefits prevailing in the locality, the Administrator will cause a new wage determination to be issued in accordance with the decision of the Administrative Law Judge or the

Secretary. Since "it was the clear intent of Congress that any revised wage determinations resulting from a section 4(c) proceeding were to have validity with respect to the procurement involved" (53 Comp. Gen. 401, 402, 1973), the solicitation, or the contract if already awarded, must be amended to incorporate the newly issued wage determination. Such new wage determination shall be made applicable to the contract as of the date of the Administrative Law Judge's decision or as of the date of the decision of the Secretary. The legislative history of the 1972 Amendments makes clear that the collectively bargained "wages and fringe benefits shall continue to be honored * * * unless and until the Secretary finds, after a hearing, that such wages and fringe benefits are substantially at variance with those prevailing in the locality for like services" (S. Rept. 92-1131, 92nd Cong., 2d Sess. 5). Thus, variance decisions do not have application retroactive to the commencement of the contract.

(d) *Sections 2(a) and 4(c) must be read in conjunction.* The Senate report accompanying the bill which amended the Act in 1972 states that "Sections 2(a)(1), 2(a)(2), and 4(c) must be read in harmony to reflect the statutory scheme." (S. Rept. 92-1131, 92nd Cong., 2d Sess. 4.) Therefore, since section 4(c) refers only to the predecessor contractor's collective bargaining agreement, the reference to collective bargaining agreements in sections 2(a)(1) and 2(a)(2) can only be read to mean a predecessor contractor's collective bargaining agreement. The fact that a successor contractor may have its own collective bargaining agreement does not negate the clear mandate of the statute that the wages and fringe benefits called for by the predecessor contractor's collective bargaining agreement shall be the minimum payable under a new (successor) contract. 48 Comp. Gen. 22, 23-24 (1968). In addition, because section 2(a) only applies to covered contracts in excess of \$2,500, the requirements of section 4(c) likewise apply only to successor contracts which may be in excess of \$2,500. However, if the successor contract is in excess of \$2,500, section 4(c) applies regardless of the amount of the predecessor contract. (See §§ 4.141-4.142 for determining contract amount.)

(e) *The operative words of section 4(c) refer to "contract" not "contractor".* Section 4(c) begins with the language, "[n]o contractor or subcontractor under a contract, which succeeds a contract subject to this Act" (emphasis supplied).

Thus, the statute is applicable by its terms to a successor contract without regard to whether the successor contractor was also the predecessor contractor. A contractor may become its own successor because it was the successful bidder on a recompetition of an existing contract, or because the contracting agency exercises an option or otherwise extends the term of the existing contract, etc. (See §§ 4.143-4.145). Further, since sections 2(a) and 4(c) must be read in harmony to reflect the statutory scheme, it is clear that the provisions of section 4(c) apply whenever the Act or the regulations require that a new wage determination be incorporated into the contract (53 Comp. Gen. 401, 404-6 (1973)).

(f) *Collective bargaining agreement must be applicable to work performed on the predecessor contract.* Section 4(c) will be operative only if the employees who worked on the predecessor contract were actually paid in accordance with the wage and fringe benefit provisions of a predecessor contractor's collective bargaining agreement. Thus, for example, section 4(c) would not apply if the predecessor contractor entered into a collective bargaining agreement for the first time, which did not become effective until after the expiration of the predecessor contract. Likewise, the requirements of section 4(c) would not apply if the predecessor contractor's collective bargaining agreement applied only to other employees of the firm and not to the employees working on the contract.

(g) *Contract reconfigurations.* As a result of changing priorities, mission requirements, or other considerations, contracting agencies may decide to restructure their support contracts. Thus, specific contract requirements from one contract may be broken out and placed in a new contract or combined with requirements from other contracts into a consolidated contract. However, the protections afforded service employees under section 4(c) are not lost or negated because of such contract reconfigurations, and the predecessor contractor's collectively bargained rates follow identifiable contract work requirements into new or consolidated contracts.

(h) *Interruption of contract services.* Other than the requirement that substantially the same services be furnished, the requirement for arm's-length negotiations and the provision for variance hearings, the Act does not impose any other restrictions on the application of section 4(c). Thus, the application of section 4(c) is not negated because the contracting authority may

change and the successor contract is awarded by a different contracting agency. Also, there is no requirement that the successor contract commence immediately after the completion or termination of the predecessor contract, and an interruption of contract services does not negate the application of section 4(c). Contract services may be interrupted because the Government facility is temporarily closed for renovation, or because a predecessor defaulted on the contract or because a bid protest has halted a contract award requiring the Government to perform the services with its own employees. In all such cases, the requirements of section 4(c) would apply to any successor contract which may be awarded after the temporary interruption or hiatus. The basic principle in all of the preceding examples is that successorship provisions of section 4(c) apply to the full term successor contract. Therefore, temporary interim contracts, which allow a contracting agency sufficient time to solicit bids for a full term contract, also do not negate the application of section 4(c) to a full term successor contract.

(i) *Place of performance.* The successorship requirements of section 4(c) apply to all contracts for substantially the same services as were furnished under the predecessor contract. The Act does not distinguish between successor contracts performed at the same Government installation and successor contracts performed at the location of a successful bidder, and the requirements of section 4(c) apply equally to both types of contracts.

(j) *Interpretation of wage and fringe benefit provisions of wage determinations issued pursuant to sections 2(a) and 4(c).* Wage determinations which are issued for successor contracts subject to section 4(c) are intended to accurately reflect the rates and fringe benefits set forth in the predecessor's collective bargaining agreement. However, failure to include in the wage determination any job classification, wage rate, or fringe benefit encompassed in the collective bargaining agreement does not relieve the successor contractor of the statutory requirement to comply at a minimum with the terms of the collective bargaining agreement insofar as wages and fringe benefits are concerned. Since the successor's obligations are governed by the terms of the collective bargaining agreement, any interpretation of the wage and fringe benefit provisions of the wage determination must be based on the intent of the parties to the collective bargaining agreement to the

extent that such interpretation is not violative of law. Therefore, some of the principles discussed in §§ 4.170-4.177 regarding specific interpretations of the fringe benefit provisions of prevailing wage determinations may not be applicable to wage determinations issued pursuant to section 4(c). As provided in section 2(a)(2), a contractor may satisfy its fringe benefit obligations under any wage determination "by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash" in accordance with the rules and regulations set forth in § 4.177 of this Subpart.

(k) No provision of this section shall be construed as permitting a successor contractor to pay its employees less than the wages and fringe benefits to which such employees would have been entitled under the predecessor contractor's collective bargaining agreement. Thus, some of the principles discussed in § 4.167 may not be applicable in section 4(c) successorship situations. For example, if the predecessor contractor's collective bargaining agreement did not provide for the deduction from employees' wages of the reasonable cost or fair value for providing board, lodging, or other facilities, then the successor also may not include such costs as part of the applicable minimum wage specified in the wage determination. Likewise, unless the predecessor contractor's agreement allowed a tip credit (§ 4.6(q)), the successor contractor may not take a tip credit toward satisfying the minimum wage requirements under sections 2(a)(1) and 4(c).

Compliance with Compensation Standards

§ 4.164 [Reserved]

§ 4.165 Wage payments and fringe benefits—in general.

(a)(1) Monetary wages specified under the Act shall be paid to the employees to whom they are due promptly and in no event later than one pay period following the end of the pay period in which they are earned. No deduction, rebate, or refund is permitted, except as hereinafter stated. The same rules apply to cash payments authorized to be paid with the statutory monetary wages as equivalents of determined fringe benefits (see § 4.177).

(2) The Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees, and the wage and fringe benefit determinations apply, in the absence of an express limitation, equally to all such service employees

engaged in work subject to the Act's provisions. (See § 4.176 regarding fringe benefit payments to temporary and part-time employees.)

(b) The Act does not prescribe the length of the pay period. However, for purposes of administration of the Act, and to conform with practices required under other statutes that may be applicable to the employment, wages and hours worked must be calculated on the basis of a fixed and regularly recurring workweek of seven consecutive 24-hour workday periods, and the records must be kept on this basis. It is appropriate to use this workweek for the pay period. A bi-weekly or semimonthly pay period may, however, be used if advance notification is given to the affected employees. A pay period longer than semi-monthly is not recognized as appropriate for service employees and wage payments at greater intervals will not be considered as constituting proper payments in compliance with the Act.

(c) The prevailing rate established by a wage determination under the Act is a minimum rate. A contractor is not precluded from paying wage rates in excess of those determined to be prevailing in the particular locality. Nor does the Act affect or require the changing of any provisions of union contracts specifying higher monetary wages or fringe benefits than those contained in an applicable determination. However, if an applicable wage determination contains a wage or fringe benefit provision for a class of service employees which is higher than that specified in an existing union agreement, the determination's provision must be observed for any work performed on a contract subject to that determination.

§ 4.166 Wage payments—unit of payment.

The standard by which monetary wage payments are measured under the Act is the wage rate per hour. An hourly wage rate is not, however, the only unit for payment of wages that may be used for employees subject to the Act. Employees may be paid on a daily, weekly, or other time basis, or by piece or task rates, so long as the measure of work and compensation used, when translated or reduced by computation to an hourly basis each workweek, will provide a rate per hour that will fulfill the statutory requirement. Whatever system of payment is used, however, must ensure that each hour of work in performance of the contract is compensated at not less than the required minimum rate. Failure to pay for certain hours at the required rate cannot be transformed into compliance

with the Act by reallocating portions of payments made for other hours which are in excess of the specified minimum.

§ 4.167 Wage payments—Medium of payment.

The wage payment requirements under the Act for monetary wages specified under its provisions will be satisfied by the timely payment of such wages to the employee either in cash or negotiable instrument payable at par. Such payment must be made finally and unconditionally and "free and clear." Scrip, tokens, credit cards, "dope checks", coupons, salvage material, and similar devices which permit the employer to retain and prevent the employee from acquiring control of money due for the work until some time after the pay day for the period in which it was earned, are not proper mediums of payment under the Act. If, as is permissible, they are used as a convenient device for measuring earnings or allowable deductions during a single pay period, the employee cannot be charged with the loss or destruction of any of them and the employer may not, because the employee has not actually redeemed them, credit itself with any which remain outstanding on the pay day in determining whether it has met the requirements of the Act. The employer may not include the cost of fringe benefits or equivalents furnished as required under section 2(a)(2) of the Act, as a credit toward the monetary wages it is required to pay under section 2(a)(1) or 2(b) of the Act (see § 4.170). However, the employer may generally include, as a part of the applicable minimum wage which it is required to pay under the Act, the reasonable cost or fair value, as determined by the Administrator, of furnishing an employee with "board, lodging, or other facilities," as defined in Part 531 of this title, in situations where such facilities are customarily furnished to employees, for the convenience of the employees, not primarily for the benefit of the employer, and the employees' acceptance of them is voluntary and uncoerced. The determination of reasonable cost or fair value will be in accordance with the Administrator's regulations under the Fair Labor Standards Act, contained in such Part 531 of this title. While employment on contracts subject to the Act would not ordinarily involve situations in which service employees would receive tips from third persons, the treatment of tips for wage purposes in the situations where this may occur should be understood. For purposes of this Act, tips may generally be included in wages in accordance with the regulations

under the Fair Labor Standards Act, contained in Part 531 (See also § 4.6(q).) The general rule under that Act is that the amount paid a tipped employee by his employer is deemed to be increased on account of tips by an amount determined by the employer, not in excess of 40 percent of the minimum wage applicable under section 6 of that Act, effective January 1, 1980. Thus, the tip credit taken by an employer subject to the Service Contract Act may not exceed \$1.34 per hour after December 31, 1980. (See § 4.163(k) for exceptions in section 4(c) situations.) In no event shall the sum credited be in excess of the value of tips actually received by the employee.

§ 4.168 Wage payments—deductions from wages paid.

(a) The wage requirements of the Act will not be met where unauthorized deductions, rebates, or refunds reduce the wage payment made to the employee below the minimum amounts required under the provisions of the Act and the regulations thereunder, or where the employee fails to receive such amounts free and clear because he "kicks back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to him. Authorized deductions are limited to those required by law, such as taxes payable by employees required to be withheld by the employer and amounts due employees which the employer is required by court order to pay to another; deductions allowable for the reasonable cost or fair value of board, lodging, and facilities furnished as set forth in § 4.167; and deductions of amounts which are authorized to be paid to third persons for the employee's account and benefit pursuant to his voluntary assignment or order or a collective bargaining agreement with bona fide representatives of employees which is applicable to the employer. Deductions for amounts paid to third persons on the employee's account which are not so authorized or are contrary to law or from which the contractor, subcontractor or any affiliated person derives any payment, rebate, commission, profit, or benefit directly or indirectly, may not be made if they cut into the wage required to be paid under the Act. The principles applied in determining the permissibility of deductions for payments made to third persons are explained in more detail in §§ 531.38 - 531.40 of this title.

(b) *Cost of maintaining and furnishing uniforms.* If the employees are required to wear uniforms either by the employer, the nature of the job, or the Government

contract, then the cost of furnishing and maintaining the uniforms is deemed to be a business expense of the employer and such cost may not be borne by the employees to the extent that to do so would reduce the employee's compensation below that required by the Act. Since it may be administratively difficult and burdensome for employers to determine the actual cost incurred by all employees for maintaining their own uniforms, payment in accordance with the following standards is considered sufficient for the contractor to satisfy its wage obligations under the Act:

(1) The contractor furnishes all employees with an adequate number of uniforms without cost to the employees or reimburses employees for the actual cost of the uniforms. (2) Where uniform cleaning and maintenance is made the responsibility of the employee, the contractor reimburses all employees for such cleaning and maintenance at the rate of \$3.10 a week (or 62 cents a day) as of January 1, 1980 and of \$3.35 a week (or 67 cents a day) as of January 1, 1981. Since employees are generally required to wear a clean uniform each day regardless of the number of hours the employee may work that day, the preceding weekly amounts generally may be reduced to the stated daily equivalent but not to an hourly equivalent. A contractor may reimburse employees at a different rate if the contractor furnishes affirmative proof as to the actual cost to the employees of maintaining their uniforms or if a different rate is provided for in a bona fide collective bargaining agreement covering the employees working on the contract.

(c) Stipends, allowances or other payments made directly to an employee by a party other than the employer (such as a stipend for training paid by the Veterans Administration) are not part of "wages" and the employer may not claim credit for such payments toward its monetary obligations under the Act.

§ 4.169 Wage payments—work subject to different rates.

If an employee during a workweek works in different capacities in the performance of the contract and two or more rates of compensation under section 2 of the Act are applicable to the classes of work which he or she performs, the employee must be paid the highest of such rates for all hours worked in the workweek unless it appears from the employer's records or other affirmative proof which of such hours were included in the periods spent in each class of work. The rule is the same where such an employee is

employed for a portion of the workweek in work not subject to the Act, for which compensation at a lower rate would be proper if the employer by his records or other affirmative proof, segregated the worktime thus spent.

§ 4.170 Furnishing fringe benefits or equivalents.

(a) *General.* Fringe benefits required under the Act shall be furnished, separate from and in addition to the specified monetary wages, by the contractor or subcontractor to the employees engaged in performance of the contract, as specified in the determination of the Secretary or his authorized representative and prescribed in the contract documents. Section 2(a)(2) of the Act provides that the obligation to furnish the specified benefits "may be discharged by furnishing any equivalent combinations of fringe benefits or by making equivalent or differential payments in cash under rules and regulations established by the Secretary." The governing rules and regulations for furnishing such equivalents are set forth in § 4.177 of this Subpart. An employer cannot offset an amount of monetary wages paid in excess of the wages required under the determination in order to satisfy his fringe benefit obligations under the Act, and must keep appropriate records separately showing amounts paid for wages and amounts paid for fringe benefits.

(b) *Meeting the requirement, in general.* The various fringe benefits listed in the Act and in § 4.162(a) are illustrative of those which may be found to be prevailing for service employees in a particular locality. The benefits which an employer will be required to furnish employees performing on a particular contract will be specified in the contract documents. A contractor may dispose of certain of the fringe benefit obligations which may be required by an applicable fringe benefit determination, such as pension, retirement, or health insurance, by irrevocably paying the specified contributions for fringe benefits to an independent trustee or other third person pursuant to an existing "bona fide" fund, plan, or program on behalf of employees engaged in work subject to the Act's provisions. Where such a plan or fund does not exist, a contractor must discharge his obligation relating to fringe benefits by furnishing either an equivalent combination of "bona fide" fringe benefits or by making equivalent payments in cash to the employee, in accordance with the regulations in § 4.177.

§ 4.171 "Bona fide" fringe benefits.

(a) To be considered a "bona fide" fringe benefit for purposes of the Act, a fringe benefit plan, fund, or program must constitute a legally enforceable obligation which meets the following criteria:

(1) The provisions of a plan, fund, or program adopted by the contractor, or by contract as a result of collective bargaining, must be specified in writing, and must be communicated in writing to the affected employees. Contributions must be made pursuant to the terms of such plan, fund, or program. The plan may be either contractor-financed or a joint contractor-employee contributory plan. However, any contributions made by employees must be voluntary, and if such contributions are made through payroll deductions, such deductions must be made in accordance with § 4.168. No contribution toward fringe benefits made by the employees themselves, or fringe benefits provided from monies deducted from the employee's wages may be included or used by an employer in satisfying any part of any fringe benefit obligation under the Act.

(2) The primary purpose of the plan must be to provide systematically for the payment of benefits to employees on account of death, disability, advanced age, retirement, illness, medical expenses, hospitalization, supplemental unemployment benefits, and the like.

(3) The plan must contain a definite formula for determining the amount to be contributed by the contractor and a definite formula for determining the benefits for each of the employees participating in the plan or the benefits provided under the plan must be specified or definitely determinable on an actuarial basis.

(4) Except as provided in paragraph (b), the contractor's contributions must be paid irrevocably to a trustee or other third person pursuant to an insurance agreement, trust or other funded arrangement. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that in no event will the contractor be able to recapture any of the contributions paid in nor in any way divert the funds to its own use or benefit.

(5) Benefit plans or trusts of the types listed in 26 U.S.C. 401(a) must be approved by the Internal Revenue Service as satisfying the requirements of section 401(a) of the Internal Revenue Code and meet the requirements of the Employee Retirement Income Security

Act of 1974, 29 U.S.C. 1001, et seq. and regulations thereunder.

(6) It should also be noted that such plans must meet certain other criteria as set forth in § 778.215 of 29 CFR 778 in order for any contributions to be excluded from computation of the regular rate of pay for overtime purposes under the Fair Labor Standards Act (§§ 4.180-4.182).

(b)(1) Unfunded self-insured fringe benefit plans (other than fringe benefits such as vacations and holidays which by their nature are normally unfunded) under which contractors allegedly make "out of pocket" payments to provide benefits as expenses may arise, rather than making irrevocable contributions to a trust or other funded arrangement as required under § 4.171(a)(4), are not considered "bona fide" plans or equivalent benefits for purposes of the Act.

(2) A contractor may request approval by the Administrator of an unfunded self-insured plan in order to allow credit for payments under the plan to meet the fringe benefit requirements of the Act. In considering whether such a plan is bona fide, the Administrator will consider such factors as whether it could be reasonably anticipated to provide the prescribed benefits, whether it represents a legally enforceable commitment to provide such benefits, whether it is carried out under a financially responsible program, and whether the plan has been communicated to the employees in writing. The Administrator in his/her discretion may direct that assets be set aside and preserved in an escrow account or that other protections be afforded to meet the plan's future obligation.

(c) No benefit required by any other Federal law or by any State or local law, such as unemployment compensation, workers' compensation, or social security, is a "bona fide" fringe benefit for purposes of the Act.

(d) The furnishing to an employee of board, lodging, or other facilities under the circumstances described in § 4.167, the cost or value of which is creditable toward the monetary wages specified under the Act, may not be used to offset any fringe benefit obligations, as such items and facilities are not fringe benefits or equivalent benefits for purposes of the Act.

(e) The furnishing of facilities which are primarily for the benefit or convenience of the contractor or the cost of which is properly a business expense of the contractor is not the furnishing of a "bona fide" fringe benefit or equivalent benefit or the payment of wages. This would be true of such items,

for example, as relocation expenses, travel and transportation expenses incident to employment, incentive or suggestion awards, and recruitment bonuses, as well as tools and other materials and services incidental to the employer's performance of the contract and the carrying on of his business, and the cost of furnishing, laundering, and maintaining uniforms and/or related apparel or equipment where employees are required by the contractor, by the contractor's Government contract, by law, or by the nature of the work to wear such items. See also § 4.168.

(f) Contributions by contractors for such items as social functions or parties for employees, flowers, cards, or gifts on employee birthdays, anniversaries, etc. (sunshine funds), employee rest or recreation rooms, paid coffee breaks, magazine subscriptions, and professional association or club dues, may not be used to offset any wages or fringe benefits specified in the contract, as such items are not "bona fide" wages or fringe benefits or equivalent benefits for purposes of the Act.

§ 4.172 Meeting requirements for particular fringe benefits—in general.

Where a fringe benefit determination specifies the amount of the employer's contribution to provide the benefit, the amount specified is the actual minimum cash amount that must be provided by the employer for the employee. No deduction from the specified amount may be made to cover any administrative costs which may be incurred by the contractor in providing the benefits, as such costs are properly a business expense of the employer. If prevailing fringe benefits for insurance or retirement are determined in a stated amount, and the employer provides such benefits through contribution in a lesser amount, he will be required to furnish the employee with the difference between the amount stated in the determination and the actual cost of the benefits which he provides. Unless otherwise specified in the particular wage determination, such as one reflecting collectively bargained fringe benefit requirements, issued pursuant to Section 4(c) of the Act, every employee performing on a covered contract must be furnished the fringe benefits required by that determination for all hours spent working on that contract up to a maximum of 40 hours per week and 2,080 (i.e., 52 weeks of 40 hours each) per year, as these are the typical number of nonovertime hours of work in a week, and in a year, respectively. Since the Act's fringe benefit requirements are applicable on a contract-by-contract basis, employees performing on more

than one contract subject to the Act must be furnished the full amount of fringe benefits to which they are entitled under each contract and applicable wage determination. Where a fringe benefit determination has been made requiring employer contributions for a specified fringe benefit in a stated amount per hour, a contractor employing employees part of the time on contract work and part of the time on other work, may only credit against the hourly amount required for the hours spent on the contract work, the corresponding proportionate part of a weekly, monthly, or other amount contributed by him for such fringe benefits or equivalent benefits for such employees. If, for example, the determination requires health and welfare benefits in the amount of 30 cents an hour and the employer provides hospitalization insurance for such employees at a cost of \$10.00 a week, the employer may credit 25 cents an hour ($\$10.00 \div 40$) toward his fringe benefit obligation for such employees. If an employee works 25 hours on the contract work and 15 hours on other work, the employer cannot allocate the entire \$10.00 to the 25 hours spent on contract work and take credit for 30 cents per hour in that manner, but must spread the cost over the full forty hours.

§ 4.173 Meeting requirements for vacation fringe benefits.

(a) *Determining length of service for vacation eligibility.* It has been found that for many types of service contracts performed at Federal facilities a successor contractor will utilize the employees of the previous contractor in the performance of the contract. The employees typically work at the same location providing the same services to the same clientele over a period of years, with periodic, often annual, changes of employer. The incumbent contractor, when bidding on a contract, must consider his liability for vacation benefits for those workers in his employ. If prospective contractors who plan to employ the same personnel were not required to furnish these employees with the same prevailing vacation benefits, it would place the incumbent contractor at a distinct competitive disadvantage as well as denying such employees entitlement to prevailing vacation benefits.

(1) Accordingly, most vacation fringe benefit determinations issued under the Act require an employer to furnish to employees working on the contract a specified amount of paid vacation upon completion of a specified length of service with a contractor or successor. This requirement may be stated in the

determination, for example, as "one week paid vacation after one year of service with a contractor or successor" or by a determination which calls for "one week's paid vacation after one year of service". Unless specified otherwise in an applicable fringe benefit determination, an employer must take the following two factors into consideration in determining when an employee has completed the required length of service to be eligible for vacation benefits:

(i) The total length of time spent by an employee in any capacity in the continuous service of the present (successor) contractor, including both the time spent in performing on regular commercial work and the time spent in performing on the Government contract itself, and

(ii) Where applicable, the total length of time spent in any capacity as an employee in the continuous service of any predecessor contractor(s) who carried out similar contract functions at the same Federal facility.

(2) The application of these principles may be illustrated by the example given above of a fringe benefit determination calling for "one week paid vacation after one year of service with a contractor or successor". In that example, if a contractor has an employee who has worked for him for 18 months on regular commercial work and only for 6 months on a Government service contract, that employee would be eligible for the one week vacation since his total service with the employer adds up to more than 1 year. Similarly, if a contractor has an employee who worked for 18 months under a janitorial service contract at a particular Federal base for two different predecessor contractors, and only 6 months with the present employer, that employee would also be considered as meeting the "after one year of service" test and would thus be eligible for the specified vacation.

(3) The "contractor or successor" requirement set forth in paragraph (a)(1) of this section is not affected by the fact that a different contracting agency may have contracted for the services previously or by the agency's dividing and/or combining the contract services. However, prior service as a Federal employee is not counted toward an employee's eligibility for vacation benefits under fringe benefit determinations issued pursuant to the Act.

(4) Some fringe benefit determinations may require an employer to furnish a specified amount of paid vacation upon completion of a specified length of service with the employer, for example, "one week paid vacation after one year

of service with an employer". Under such determinations, only the time spent in performing on commercial work and on Government contract work in the employment of the present contractor need be considered in computing the length of service for purposes of determining vacation eligibility.

(5) Whether or not the predecessor contract(s) was covered by a fringe benefit determination is immaterial in determining whether the one year of service test has been met. This qualification refers to work performed before, as well as after, an applicable fringe benefit determination is incorporated into a contract. Also, the fact that the labor standards in predecessor service contract(s) were only those required under the Fair Labor Standards Act has no effect on the applicable fringe benefit determination contained in a current contract.

(b) Eligibility requirement—*continuous service.* Under the principles set forth above, if an employee's total length of service adds up to at least one year, the employee is eligible vacation with pay. However, such service must have been rendered continuously for a period of not less than one year for vacation eligibility. The term "continuous service" does not require the combination of two entirely separate periods of employment. Whether or not there is a break in the continuity of service so as to make an employee ineligible for a vacation benefit is dependent upon all the facts in the particular case. No fixed time period has been established for determining whether an employee has a break in service. Rather, as illustrated below, the reason(s) for an employee's absence from work is the primary factor in determining whether a break in service occurred.

(1) In cases where employees have been granted leave with or without pay by their employer, or are otherwise absent with permission for such reasons as sickness or injury, or otherwise perform no work on the contract because of reasons beyond their control, there would not be a break in service. Likewise, the absence from work for a few days, with or without notice, does not constitute a break in service, without a formal termination of employment. The following specific examples are illustrative situations where it has been determined that a break in service did not occur:

- (i) An employee absent for five months due to illness but employed continuously for three years.
- (ii) A strike after which employees returned to work.

(iii) An interim period of three months between contracts caused by delays in the procurement process during which time personnel hired directly by the Government performed the necessary services. However, the successor contractor in this case was not held liable for vacation benefits for those employees who had anniversary dates of employment during the interim period because no employment relationship existed during such period.

(iv) A mess hall closed three months for renovation. Contractor employees were considered to be on temporary layoff during the renovation period and did not have a break in service.

(2) Where an employee quits, is fired for cause, or is otherwise terminated (except for temporary layoffs), there would be a break in service even if the employee were rehired at a later date. However, an employee may not be discharged and rehired as a subterfuge to evade the vacation requirement.

(c) *Vesting and payment of vacation benefits.*

(1) In the example given in paragraph (a)(1) of this section of a fringe benefit determination calling for "one week paid vacation after 1 year of service with a contractor or successor", an employee who renders the "one year of service" continuously becomes eligible for the "one week paid vacation" (i.e., 40 hours of paid vacation, unless otherwise specified in an applicable wage determination) upon his anniversary date of employment and upon each succeeding anniversary date thereafter. However, there is no accrual or vesting of vacation eligibility before the employee's anniversary date of employment, and no segment of time smaller than one year need be considered in computing the employer's vacation liability, unless specifically provided for in a particular fringe benefit determination. For example, an employee who has worked 13 months for an employer subject to such stipulations and is separated without receiving any vacation benefit is entitled only to one full week's (40 hours) paid vacation. He would not be entitled to the additional fraction of one-twelfth of one week's paid vacation for the month he worked in the second year unless otherwise stated in the applicable wage determination. An employee who has not met the "one year of service" requirement would not be entitled to any portion of the "one week paid vacation".

(2) Eligibility for vacation benefits specified in a particular wage determination is based on completion of the stated period of past service. The individual employee's anniversary date

(and each annual anniversary date of employment thereafter) is the reference point for vesting of vacation eligibility, but does not necessarily mean that the employee must be given the vacation or paid for it on the date on which it is vested. The vacation may be scheduled according to a reasonable plan mutually agreed to and communicated to the employees. A "reasonable" plan may be interpreted to be a plan which allows the employer to maintain uninterrupted contract services but allows the employee some choice, by seniority or similar factor, in the scheduling of vacations. However, the required vacation must be given or payment made in lieu thereof before the next anniversary date, before completion of the current contract, or before the employee terminates employment, whichever occurs first.

(d) *Contractor liability for vacation benefits.*

(1) The liability for an employee's vacation is not prorated among contractors unless specifically provided for under a particular fringe benefit determination. The contractor by whom a person is employed at the time the vacation right vests, i.e., on the employee's anniversary date of employment, must provide the full benefit required by the determination which is applicable on that date. For example, an employee, who had not previously performed similar contract work at the same facility, was first hired by a predecessor contractor on July 1, 1978. July 1 is the employee's anniversary date. The predecessor's contract ended June 30, 1979, but the employee continued working on the contract for the successor. Since the employee did not have an anniversary date of employment during the predecessor's contract, the predecessor would not have any vacation liability with respect to this employee. However, on July 1, 1979 the employee's entitlement to the full vacation benefit vested and the successor contractor would be liable for the full amount of the employee's vacation benefit.

(2) The requirements for furnishing data relative to employee hiring dates in situations where such employees worked for "predecessor" contractors are set forth in § 4.6. However, a contractor is not relieved from any obligation to provide vacation benefits because of any difficulty in obtaining such data.

(e) *Rate applicable to computation of vacation benefits.*

(1) If an applicable wage determination requires that the hourly wage rate be increased during the period of the contract, the rate

applicable to the computation of any required vacation benefits is the hourly rate in effect in the workweek in which the actual paid vacation is provided or the equivalent is paid, as the case may be, and would not be the average of the two hourly rates. This rule would not apply to situations where a wage determination specified the method of computation and the rate to be used.

(2) As set forth in § 4.172, unless specified otherwise in an applicable fringe benefit determination, service employees must be furnished the required amount of fringe benefits for all hours paid for up to a maximum of 40 hours per week and 2,080 hours per year. Thus, an employee on paid vacation leave would accrue and must be compensated for any other applicable fringe benefits specified in the fringe benefit determination, and if any of the other benefits are furnished in the form of cash equivalents, such equivalents must be included with the applicable hourly wage rate in computing vacation benefits or a cash equivalent therefor. The rules and regulations for computing cash equivalents are set forth in § 4.177.

§ 4.174 Meeting requirements for holiday fringe benefits.

(a) Determining eligibility for holiday benefits—in general.

(1) Most fringe benefit determinations list a specific number of named holidays for which payment is required. Unless specified otherwise in an applicable determination, an employee who performs any work during the workweek in which a named holiday occurs is entitled to the holiday benefit, regardless of whether the named holiday falls on a Sunday, another day during the workweek on which the employee is not normally scheduled to work, or on the employee's day off. In addition, holiday benefits cannot be denied because the employee has not been employed by the contractor for a designated period prior to the named holiday or because the employee did not work the day before or the day after the holiday, unless such qualifications are specifically included in the determination.

(2) An employee who performs no work during the workweek in which a named holiday occurs is generally not entitled to the holiday benefit. However, an employee who performs no work during the workweek because he is on paid vacation or sick leave in accordance with the terms of the applicable fringe benefit determination is entitled to holiday pay or another day off with pay to substitute for the named holiday. In addition, an employee who performs no work during the workweek

because of a layoff does not forfeit his entitlement to holiday benefits if the layoff is merely a subterfuge by the contractor to avoid the payment of such benefits.

(3) The obligation to furnish holiday pay for the named holiday may be discharged if the contractor furnishes another day off with pay in accordance with a plan communicated to the employees involved. However, in such instances the holidays named in the fringe benefit determination are the reference points for determining whether an employee is eligible to receive holiday benefits. In other words, if an employee worked in a workweek in which a listed holiday occurred, the employee is entitled to pay for that holiday. Some determinations may provide for a specific number of holidays without naming them. In such instances the contractor is free to select the holidays to be taken in accordance with a plan communicated to the employees involved, and the agreed-upon holidays are the reference points for determining whether an employee is eligible to receive holiday benefits.

(b) *Determining eligibility for holiday benefits—newly hired employees.* The contractor generally is not required to compensate a newly hired employee for the holiday occurring prior to the hiring of the employee. However, in the one situation where a named holiday falls in the first week of a contract, all employees who work during the first week would be entitled to holiday pay for that day. For example, if a contract to provide services for the period January 1 through December 31 contained a fringe benefit determination listing New Year's Day as a named holiday, and if New Year's Day were officially celebrated on January 2 in the year in question because January 1 fell on a Sunday, employees hired to begin work on January 3 would be entitled to holiday pay for New Year's Day.

(c) *Payment of holiday benefits.*

(1) A full-time employee who is eligible to receive payment for a named holiday must receive a full day's pay up to 8 hours unless a different standard is used in the fringe benefit determination, such as one reflecting collectively bargained holiday benefit requirements issued pursuant to Section 4(c) of the Act or a different historic practice in an industry or locality. Thus, for example, a contractor must furnish 7 hours of holiday pay to a full-time employee whose scheduled workday consists of 7 hours. An employee whose scheduled workday is 10 hours would be entitled to a holiday payment of 8 hours unless a different standard is used in the determination. As discussed in § 4.172,

such holiday pay must include the full amount of other fringe benefits to which the employee is entitled.

(2) Unless a different standard is used in the wage determination, a full-time employee who works on the day designated as a holiday must be paid, in addition to the amount he ordinarily would be entitled to for that day's work, the cash equivalent of a full-day's pay up to 8 hours or be furnished another day off with pay.

(3) If the fringe benefit determination lists the employee's birthday as a paid holiday and that day coincides with another listed holiday, the contractor may discharge his obligation to furnish payment for the second holiday by either substituting another day off with pay with the consent of the employee, furnishing holiday benefits of an extra day's pay, or if the employee works on the holiday in question, furnishing holiday benefits of two extra days' pay.

(4) As stated in paragraph (a)(1) of this section, an employee's entitlement to holiday pay fully vests by working in the workweek in which the named holiday occurs. Accordingly, any employee who is terminated before receiving the full amount of holiday benefits due him must be paid the holiday benefits as a final cash payment.

(5) The rules and regulations for furnishing holiday pay to temporary and part-time employees are discussed in § 4.176.

(6) The rules and regulations for furnishing equivalent fringe benefits or cash equivalents in lieu of holiday pay are discussed in § 4.177.

§ 4.175 Meeting requirements for health, welfare, and/or pension benefits.

(a) *Determining the required amount of benefits.*

(1) Most fringe benefit determinations containing health and welfare and/or pension requirements specify a fixed payment per hour on behalf of each service employee. These payments are usually also stated as weekly or monthly amounts. As set forth in § 4.172, unless specified otherwise in the applicable determination such payments are due for all hours paid for, including paid vacation, sick leave, and holiday hours, up to a maximum of 40 hours per week and 2,080 hours per year on each contract. The application of this rule can be illustrated by the following examples:

(i) An employee who works 4 days a week, 10 hours a day is entitled to 40 hours of health and welfare and/or pension fringe benefits. If an employee works 3 days a week, 12 hours a day, then such employee is entitled to 36 hours of these benefits.

(ii) An employee who works 32 hours in a workweek and also receives 8 hours of holiday pay is entitled to the maximum of 40 hours of health and welfare and/or pension payments in that workweek. If the employee works more than 32 hours and also received 8 hours of holiday pay, the employee is still only entitled to the maximum of 40 hours of health and welfare and/or pension payments.

(iii) If an employee is off work for two weeks on vacation and received 80 hours of vacation pay, the employee must also receive payment for the 80 hours of health and welfare and/or pension benefits which accrue during the vacation period.

(iv) An employee entitled to two weeks paid vacation who instead works the full 52 weeks in the year, receiving the full 2,080 hours worth of health and welfare and/or pension benefits, would be due an extra 80 hours of vacation pay in lieu of actually taking the vacation; however, such an employee would not be entitled to have an additional 80 hours of health and welfare and/or pension benefits included in his vacation pay.

(2) A fringe benefit determination calling for a specified benefit such as health insurance contemplates a fixed and definite contribution to a "bona fide" plan (as that term is defined in § 4.171) by an employer on behalf of each employee, based on the monetary cost to the employer rather than on the level of benefits provided. Therefore, in determining compliance with an applicable fringe benefit determination, the amount of the employer's contribution on behalf of each individual employee governs. Thus, as set forth in § 4.172, if a determination should require a contribution to a plan providing a specified fringe benefit and that benefit can be obtained for less than the required contribution, it would be necessary for the employer to make up the difference in cash to the employee, or furnish equivalent benefits, or a combination thereof. The following illustrates the application of this principle: A fringe benefit determination requires a rate of \$36.40 per month employee for a health insurance plan. The employer obtains the health insurance coverage specified at a rate of \$20.45 per month for a single employee, \$30.60 for an employee with spouse, and \$40.90 for an employee with a family. The employer is required to make up the difference in cash or equivalent benefits to the first two classes of employees in order to satisfy the determination, notwithstanding that coverage for an employee would be automatically

changed by the employer if the employee's status should change (e.g., single to married) and notwithstanding that the employer's average contribution per employee may be equal to or in excess of \$36.40 per month.

(3) In determining eligibility for benefits under certain wage determinations containing hours or length of service requirements (such as having to work 40 hours in the preceding month), the contractor must take into account time spent by employees on commercial work as well as time spent on the Government contract.

(b) Some fringe benefit determinations specifically provide for health and welfare and/or pension benefits in terms of average cost. Under this concept, a contractor's contributions per employee to a "bona fide" fringe benefit plan are permitted to vary depending upon the individual employee's marital or employment status. However, the firm's total contributions for all service employees enrolled in the plan must average at least the fringe benefit determination requirement per hour per service employee. If the contractor's contributions average less than the amount required by the determination, then the firm must make up the deficiency by making cash equivalent payments or equivalent fringe benefit payments to all service employees in the plan who worked on the contract during the payment period. Where such deficiencies are made up by means of cash equivalent payments, the payments must be made promptly on the following payday. The following illustrates the application of this principle: The determination requires an average contribution of \$0.84 an hour. The contractor makes payments to bona fide fringe benefit plans on a monthly basis. During a month the firm contributes \$15,000 for the service employees employed on the contract who are enrolled in the plan, and a total of 20,000 man-hours had been worked by all service employees during the month. Accordingly, the firm's average cost would have been $\$15,000 \div 20,000$ hours or \$0.75 per hour, resulting in a deficiency of \$0.09 per hour. Therefore, the contractor owes the service employees in the plan who worked on the contract during the month an additional \$0.09 an hour for each hour worked on the contract, payable on the next regular payday for wages. Unless otherwise provided in the applicable wage determination, contributions made by the employer for non-service employees may not be credited toward meeting Service Contract Act fringe benefit obligations.

(c) *Employees not enrolled in or excluded from participating in fringe benefit plans.*

(1) Some health and welfare and pension plans contain eligibility exclusions for certain employees. For example, temporary and part-time employees may be excluded from participating in such plans. Also, employees receiving benefits through participation in plans of an employer other than the Government contractor or by a spouse's employer may be prevented from receiving benefits from the contractor's plan because of prohibitions against "double coverage". While such exclusions do not invalidate an otherwise bona fide insurance plan, employer contributions to such a plan cannot be considered to be made on behalf of the excluded employees. Accordingly, under fringe benefit determination requirements as described in the preceding subparagraph (a)(2), the employees excluded from participation in the health insurance plan must be furnished equivalent bona fide fringe benefits or be paid a cash equivalent payment during the period that they are not eligible to participate in the plan.

(2) It is not required that all employees participating in a fringe benefit plan be entitled to receive benefits from that plan at all times. For example, under some plans, newly hired employees who are eligible to participate in an insurance plan from their first day of employment may be prohibited from receiving benefits from the plan during a specified "waiting period". Contributions made on behalf of such employees would serve to discharge the contractor's obligation to furnish the fringe benefit. However, if no contributions are made for such employees, no credit may be taken toward the contractor's fringe benefit obligations.

(d) *Payment of health and welfare and pension benefits.*

(1) Health and welfare and/or pension payments to a "bona fide" insurance plan or trust program may be made on a periodic payment basis which is not less often than quarterly. However, where fringe benefit determinations contemplate a fixed contribution on behalf of each employee, and a contractor exercises his option to make hourly cash equivalent or differential payments, such payments must be made promptly on the regular payday for wages. (See § 4.165.)

(2) The rules and regulations for furnishing health and welfare and pension benefits to temporary and part-time employees are discussed in § 4.176.

(3) The rules and regulations for furnishing equivalent fringe benefits or cash equivalents in lieu of health and welfare and pension benefits are discussed in § 4.177.

§ 4.176 Payment of fringe benefits to temporary and part-time employees.

(a) As set forth in § 4.165(a)(2), the Act makes no distinction, with respect to its compensation provisions, between temporary, part-time, and full-time employees. Accordingly, in the absence of express limitations, the provisions of an applicable fringe benefit determination apply to all temporary and part-time service employees engaged in covered work. However, in general, such temporary and part-time employees are only entitled to an amount of the fringe benefits specified in an applicable determination which is proportionate to the amount of time spent in covered work. The application of these principles may be illustrated by the following examples:

(1) Assuming the paid vacation for full-time employees is one week of 40 hours, a part-time employee working a regularly scheduled workweek of 16 hours is entitled to 16 hours of paid vacation time or its equivalent each year, if all other qualifications are met.

(2) In the case of holidays, a part-time employee working a regularly scheduled workweek of 16 hours would be entitled to two-fifths of the holiday pay due full-time employees. It is immaterial whether or not the holiday falls on a normal workday of the part-time employee. A temporary or casual employee hired during a holiday week, but after the holiday, would be due no holiday benefits for that week.

(3) Holiday or vacation pay obligations to temporary and part-time employees working an irregular schedule of hours may be discharged by paying such employees a proportion of the holiday or vacation benefits due full-time employees based on the number of hours each such employee worked in the workweek prior to the workweek in which the holiday occurs or, with respect to vacations, the number of hours which the employee worked in the year preceding the employee's anniversary date of employment. For example:

(i) An employee works 10 hours during the week preceding July 4, a designated holiday. The employee is entitled to 10/40 of the holiday pay to which a full-time employee is entitled (i.e., 10/40 times 8 = 2 hours holiday pay).

(ii) A part-time employee works 520 hours during the 12 months preceding the employee's anniversary date. Since

the typical number of nonovertime hours in a year of work is 2,080, if a full-time employee would be entitled to one week (40 hours) paid vacation under the applicable fringe benefit determination, then the part-time employee would be entitled to 520/2,080 times 40 = 10 hours paid vacation.

(4) A part-time employee working a regularly scheduled workweek of 20 hours would be entitled to one-half of the health and welfare and/or pension benefits specified in the applicable fringe benefit determination. Thus, if the determination requires \$36.40 per month for health insurance, the contractor could discharge his obligation towards the employee in question by providing a health insurance policy costing \$18.20 per month.

(b) A contractor's obligation to furnish the specified fringe benefits to temporary and part-time employees may be discharged by furnishing equivalent benefits, cash equivalents, or a combination thereof in accordance with the rules and regulations set forth in § 4.177.

§ 4.177 Discharging fringe benefit obligations by equivalent means.

(a) *In general.*

(1) Section 2(a)(2) of the Act, which provides for fringe benefits that are separate from and in addition to the monetary compensation required under section 2(a)(1), permits an employer to discharge his obligation to furnish the fringe benefits specified in an applicable fringe benefit determination by furnishing any equivalent combinations of "bona fide" fringe benefits or by making equivalent or differential payments in cash. However, credit for such payments is limited to the employer's fringe benefit obligations under section 2(a)(2), since the Act does not authorize any part of the monetary wage required by section 2(a)(1) and specified in the wage determination and the contract, to be offset by the fringe benefit payments or equivalents which are furnished or paid pursuant to section 2(a)(2).

(2) When a contractor substitutes fringe benefits not specified in the fringe benefit determination contained in the contract for fringe benefits which are so specified, the substituted fringe benefits, like those for which the contract provisions are prescribed, must be "bona fide" fringe benefits, as that term is defined in § 4.171.

(3) When a contractor discharges his fringe benefit obligation by furnishing, in lieu of those benefits specified in the applicable fringe benefit determination, other "bona fide" fringe benefits, cash payments, or a combination thereof, the

substituted fringe benefits and/or cash payments must be "equivalent" to the benefits specified in the determination. As used in this subpart, the terms "equivalent fringe benefit" and "cash equivalent" mean equal in terms of monetary cost to the contractor. Thus, as set forth in § 4.172, if an applicable fringe benefit determination calls for a particular fringe benefit in a stated amount and the contractor furnished this benefit through contributions in a lesser amount, the contractor must furnish the employee with the difference between the amount stated in the determination and the actual cost of the benefit which the contractor provides. This principle may be illustrated by the example given in § 4.175(a)(2).

(b) *Furnishing equivalent fringe benefits.*

(1) A contractor's obligation to furnish fringe benefits which are stated in a specified cash amount may be discharged by furnishing any combination of "bona fide" fringe benefits costing an equal amount. Thus, if an applicable determination specifies that 20 cents per hour is to be paid into a pension fund, this fringe benefit obligation will be deemed to be met if, instead, hospitalization benefits costing not less than 20 cents per hour are provided. The same obligation will be met if hospitalization benefits costing 10 cents an hour and life insurance benefits costing 10 cents an hour are provided. As set forth in § 4.171(c), no benefit required to be furnished the employee by any other law, such as workers' compensation, may be credited toward satisfying the fringe benefit requirements of the Act.

(2) A contractor who wishes to furnish equivalent fringe benefits in lieu of those benefits which are not stated in a specified cash amount, such as "one week paid vacation", must first determine the equivalent cash value of such benefits in accordance with the rules set forth in paragraph (c) of this section.

(c) *Furnishing cash equivalents.*

(1) Fringe benefit obligations may be discharged by paying to the employee on his regular payday, in addition to the monetary wage required, a cash amount per hour in lieu of the specified fringe benefits, provided such amount is equivalent to the cost of the fringe benefits required. If, for example, an employee's monetary rate under an applicable determination is \$4.50 an hour, and the fringe benefits to be furnished are hospitalization benefits costing 20 cents an hour and retirement benefits costing 20 cents an hour, the fringe benefit obligation is discharged if instead of furnishing the required fringe

benefits, the employer pays the employee, in cash, 40 cents per hour as the cash equivalent of the fringe benefits in addition to the \$4.50 per hour wage rate required under the applicable wage determination.

(2) The hourly cash equivalent of those fringe benefits which are not stated in the applicable determination in terms of hourly cash amounts may be obtained by mathematical computation through the use of pertinent factors such as the monetary wages paid the employee and the hours of work attributable to the period, if any, by which fringe benefits are measured in the determination. If the employee's regular rate of pay is greater than the minimum monetary wage specified in the wage determination and the contract, the former must be used for this computation, and if the fringe benefit determination does not specify any daily or weekly hours of work by which benefits are to be measured, a standard 8-hour day and 40-hour week will be considered applicable. The application of these rules in typical situations is illustrated in paragraphs (c) (3) through (7) of this section.

(3) Where fringe benefits are stated as a percentage of the monetary rate, the hourly cash equivalent is determined by multiplying the stated percentage by the employees' regular or basic (i.e., wage determination) rate of pay, whichever is greater. For example, if the determination calls for a 5 percent pension fund payment and the employee is paid a monetary rate of \$4.50 an hour, or if the employee earns \$4.50 an hour on a piece-work basis in a particular workweek, the cash equivalent of that payment would be 22½ cents an hour.

(4) If the determination lists a particular fringe benefit in such terms as \$8 a week, the hourly cash equivalent is determined by dividing the amount stated in the determination by the number of working hours to which the amount is attributable. For example, if a determination lists a fringe benefit as "pension—\$8 a week", and does not specify weekly hours, the hourly cash equivalent is 20 cents per hour, i.e., \$8 divided by 40, the standard number of non-overtime working hours in a week.

(5) In determining the hourly cash equivalent of those fringe benefits which are not stated in the determination in terms of a cash amount, but are stated, for example, as "nine paid holidays per year" or "1 week paid vacation after one year of service", the employee's hourly monetary rate of pay is multiplied by the number of hours making up the paid holidays or vacation. Unless the hours contemplated in the fringe benefit are specified in the determination, a

standard 8-hour day and 40-hour week is considered applicable. The total annual cost so determined is divided by 2,080, the standard number of non-overtime hours in a year of work, to arrive at the hourly cash equivalent. This principle may be illustrated by the following examples:

(i) If a particular determination lists as a fringe benefit "nine holidays per year" and the employee's hourly rate of pay is \$4.50, the \$4.50 is multiplied by 72 (9 days of 8 hours each) and the result, \$324, is then divided by 2,080 to arrive at the hourly cash equivalent, \$0.1557 an hour. See § 4.174(c)(4).

(ii) If the determination requires "one week paid vacation after one year of service", and the employee's hourly rate of pay is \$4.50, the \$4.50 is multiplied by 40 and the result, \$180.00, is then divided by 2,080 to arrive at the hourly cash equivalent, \$0.0865 an hour.

(6) Where an employer elects to pay an hourly cash equivalent in lieu of a paid vacation, which is computed in accordance with paragraph (c)(5) of this section, such payments need commence only after the employee has satisfied the "after one year of service" requirement. However, should the employee terminate employment for any reason before receiving the full amount of vested vacation benefits due, the employee must be paid the full amount of any difference remaining as the final cash payment. For example, an employee becomes eligible for a week's vacation pay on March 1. The employer elects to pay this employee an hourly cash equivalent beginning that date; the employee terminates employment on March 31. Accordingly, as this employee has received only ½ of the vacation pay to which he/she is entitled, the employee is due the remaining ½ upon termination. As set forth in § 4.173(e), the rate applicable to the computation of cash equivalents for vacation benefits is the hourly wage rate in effect at the time such equivalent payments are actually made.

(d) *Furnishing a combination of equivalent fringe benefits and cash payments.* Fringe benefit obligations may be discharged by furnishing any combination of cash or fringe benefits as illustrated in the preceding paragraphs of this section, in monetary amounts the total of which is equivalent, under the rules therein stated, to the determined fringe benefits specified in the contract. For example, if an applicable determination specifies that 20 cents per hour is to be paid into a pension fund, this fringe benefit obligation will be deemed to be met if instead, hospitalization benefits costing 15 cents

an hour and a cash equivalent payment of 5 cents an hour are provided.

(e) *Effect of equivalents in computing overtime pay.* Section 6 of the Act excludes from the regular or basic hourly rate of an employee, for purposes of determining the overtime pay to which the employee is entitled under any other Federal law, those fringe benefit payments computed under the Act which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(e) (formerly designated as section 7(d)) of that Act (29 U.S.C. 207(e)). Fringe benefit payments which qualify for such exclusion are described in Subpart C of Regulations, 29 CFR Part 778. When such fringe benefits are required to be furnished to service employees engaged in contract performance, the right to compute overtime pay in accordance with the above rule is not lost to a contractor or subcontractor because it discharges its obligation under this Act to furnish such fringe benefits through alternative equivalents as provided in this section. If it furnishes equivalent benefits or makes cash payments, or both, to such an employee as authorized herein, the amounts thereof, which discharge the employer's obligation to furnish such specified fringe benefits, may be excluded pursuant to this Act from the employee's regular or basic rate of pay in computing any overtime pay due the employee under any other Federal law. No such exclusion can operate, however, to reduce an employee's regular or basic rate of pay below the monetary wage rate specified as the applicable minimum wage rates under sections 2(a)(1), 2(b), or 4(c) of this Act or under other law or an employment contract.

§ 4.178 Computation of hours worked.

Since employees subject to the Act are entitled to the minimum compensation specified under its provisions for each hour worked in performance of a covered contract, a computation of their hours worked in each workweek when such work under the contract is performed is essential. Determinations of hours worked will be made in accordance with the principles applied under the Fair Labor Standards Act as set forth in Part 785 of this title which is incorporated herein by reference. In general, the hours worked by an employee include all periods in which the employee is suffered or permitted to work whether or not required to do so, and all time during which the employee is required to be on duty or to be on the employer's premises or to be at a prescribed workplace. The hours worked which are subject to the

compensation provisions of the Act are those in which the employee is engaged in performing work on contracts subject to the Act. However, unless such hours are adequately segregated, as indicated in § 4.179, compensation in accordance with the Act will be required for all hours of work in any workweek in which the employee performs any work in connection with the contract, in the absence of affirmative proof to the contrary that such work did not continue throughout the workweek.

§ 4.179 Identification of contract work.

Contractors and subcontractors under contracts subject to the Act are required to comply with its compensation requirements throughout the period of performance on the contract and to do so with respect to all employees who in any workweek are engaged in performing work on such contracts. If such a contractor during any workweek is not exclusively engaged in performing such contracts, or if while so engaged it has employees who spend a portion but not all of their worktime in the workweek in performing work on such contracts, it is necessary for the contractor to identify accurately in its records, or by other means, those periods in each such workweek when the contractor and each such employee performed work on such contracts. In cases where contractors are not exclusively engaged in Government contract work, and there are adequate records segregating the periods in which work was performed on contracts subject to the Act from periods in which other work was performed, the compensation specified under the Act need not be paid for hours spent on non-contract work. However, in the absence of records adequately segregating non-covered work from the work performed on or in connection with the contract, all employees working in the establishment or department where such covered work is performed shall be presumed to have worked on or in connection with the contract during the period of its performance, unless affirmative proof establishing the contrary is presented. Similarly, in the absence of such records, an employee performing any work on or in connection with the contract in a workweek shall be presumed to have continued to perform such work throughout the workweek, unless affirmative proof establishing the contrary is presented. Even where a contractor can segregate Government from non-Government work, it is necessary that the contractor comply with the requirements of section 6(e) of the FLSA discussed in § 4.180.

Overtime Pay of Covered Employees

§ 4.180 Overtime pay—in general.

The Act does not provide for compensation of covered employees at premium rates for overtime hours of work. Section 6 recognizes however, that other Federal laws may require such compensation to be paid to employees working on or in connection with contracts subject to the Act (see § 4.181) and prescribes, for purposes of such laws, the manner in which fringe benefits furnished pursuant to the Act shall be treated in computing such overtime compensation as follows: "In determining any overtime pay to which such service employees are entitled under any Federal law, the regular or basic hourly rate of such an employee shall not include any fringe benefit payments computed hereunder which are excluded from the regular rate under the Fair Labor Standards Act by provisions of section 7(d) [now section 7(e)] thereof." Fringe benefit payments which qualify for such exclusion are described in Part 778, Subpart C of this title. The interpretations there set forth will be applied in determining the overtime pay to which covered service employees are entitled under other Federal statutes. The effect of section 6 of the Act in situations where equivalent fringe benefits or cash payments are provided in lieu of the specified fringe benefits is stated in § 4.177(e) of this part, and illustrated in § 4.182.

§ 4.181 Overtime pay provisions of other Acts.

(a) *Fair Labor Standards Act.* Although provision has not been made for insertion in Government contracts of stipulations requiring compliance with the overtime provisions of the Fair Labor Standards Act, contractors and subcontractors performing contracts subject to the McNamara-O'Hara Service Contract Act may be required to compensate their employees working on or in connection with such contracts for overtime work pursuant to the overtime pay standards of the Fair Labor Standards Act. This is true with respect to employees engaged in interstate or foreign commerce or in the production of goods for such commerce (including occupations and processes closely related and directly essential to such production) and employees employed in enterprises which are so engaged, subject to the definitions and exceptions provided in such Act. Such employees, except as otherwise specifically provided in such Act, must receive overtime compensation at a rate of not less than 1½ times their regular rate of pay for all hours worked in excess of the

applicable standard in a workweek. See Part 778 of this title. However, the Fair Labor Standards Act provides no overtime pay requirements for employees, not within such interstate commerce coverage of the Act, who are subject to its minimum wage provisions only by virtue of the provisions of section 6(e), as explained in § 4.180.

(b) *Contract Work Hours and Safety Standards Act.* (1) The Contract Work Hours and Safety Standards Act (40 U.S.C. 327-332) applies generally to Government contracts, including service contracts in excess of \$2,500, which may require or involve the employment of laborers and mechanics. Guards, watchmen, and many other classes of service employees are laborers or mechanics within the meaning of such Act. However, employees rendering only professional services, seamen, and as a general rule those whose work is only clerical or supervisory or nonmanual in nature, are not deemed laborers or mechanics for purposes of the Act. The wages of every laborer or mechanic for performance of work on such contracts must include compensation at a rate not less than 1½ times the employee's basic rate of pay for all hours worked in any workweek in excess of 40 or in excess of eight on any calendar days therein, whichever is the greater number of overtime hours. Exemptions are provided for certain transportation and communications contracts, contracts for the purchase of supplies ordinarily available in the open market, and work required to be done in accordance with the provisions of the Walsh-Healey Act.

(2) Regulations concerning this Act are contained in Subparts A and C of 29 CFR Part 5 which permit overtime pay to be computed in the same manner as under the Fair Labor Standards Act, subject of course to the differences in computations required by reason of the daily overtime provision of the Contract Work Hours and Safety Standards Act, which has no counterpart in the Fair Labor Standards Act.

(3) Although the application of the Contract Work Hours and Safety Standards Act does not depend on inclusion of its requirements in provisions physically made part of the contract, the Act and the regulations of the Secretary require such provisions to be set forth in contract clauses. (See § 5.5(c) of this subtitle.)

(c) *Walsh-Healey Public Contracts Act.* As pointed out in § 4.117, while some Government contracts may be subject both to the McNamara-O'Hara Service Contract Act and to the Walsh-Healey Public Contracts Act, the employees performing work on the contract which is subject to the latter

Act are, when so engaged, exempt from the provisions of the former. They are, however, subject to the overtime provisions of the Walsh-Healey Act if, in any workweek, any of the work performed for the employer is subject to such Act and if, in such workweek, the total hours worked by the employee for the employer (whether wholly or only partly on such work) exceed 40 hours in the workweek or 8 hours in any day therein. In any such workweek the Walsh-Healey Act requires payment of overtime compensation at a rate not less than 1½ times the employee's basic rate for such weekly or daily overtime hours, whichever are greater in number. The overtime pay provisions of the Walsh-Healey Act are discussed in greater detail in 41 CFR Part 50-201.

§ 4.182 Overtime pay of service employees entitled to fringe benefits.

Reference is made in § 4.180 to the rules prescribed by section 6 of the Act which permit exclusion of certain fringe benefits and equivalents provided pursuant to section 2(a)(2) of the Act from the regular or basic rate of pay when computing overtime compensation of a service employee under the provisions of any other Federal law. As provided in § 4.177, not only those fringe benefits excludable under section 6 as benefits determined and specified under section 2(a)(2), but also equivalent fringe benefits and cash payments furnished in lieu of the specified benefits may be excluded from the regular or basic rate of such an employee. The application of this rule may be illustrated by the following examples:

(a) The A company pays a service employee \$4.50 an hour in cash under a wage determination which requires a monetary rate of not less than \$4 and a fringe benefit contribution of 50 cents which would qualify for exclusion from the regular rate under section 7(e) of the Fair Labor Standards Act. The contractor pays the 50 cents in cash because he made no contributions for fringe benefits specified in the determination and the contract. Overtime compensation in this case would be computed on a regular or basic rate of \$4 an hour.

(b) The B company has for some time been paying \$4.25 an hour to a service employee as his basic cash wage plus 25 cents an hour as a contribution to a welfare and pension plan, which contribution qualifies for exclusion from the regular rate under the Fair Labor Standards Act. For performance of work under a contract subject to the Act a monetary rate of \$4 and a fringe benefit contribution of 50 cents (also qualifying for such exclusion) are specified

because they are found to be prevailing for such employees in the locality. The contractor may credit the 25 cent welfare and pension contribution toward the discharge of his fringe benefit obligation under the contract but must also make an additional contribution of 25 cents for the specified or equivalent fringe benefits or pay the employee an additional 25 cents in cash. These contributions or equivalent payments may be excluded from the employee's regular rate which remains \$4.25, the rate agreed upon as the basic cash wage.

(c) The C company has been paying \$4 an hour as its basic cash wage on which the firm has been computing overtime compensation. For performance of work on a contract subject to the Act the same rate of monetary wages and a fringe benefit contribution of 50 cents an hour (qualifying for exclusion from the regular rate under the Fair Labor Standards Act) are specified in accordance with a determination that these are the monetary wages and fringe benefits prevailing for such employees in the locality. The contractor is required to continue to pay at least \$4 an hour in monetary wages and at least this amount must be included in the employee's regular or basic rate for overtime purposes under applicable Federal law. The fringe benefit obligation under the contract would be discharged if 50 cents of the contributions for fringe benefits were for the fringe benefits specified in the contract or equivalent benefits as defined in § 4.177. The company may exclude such fringe benefit contributions from the regular or basic rate of pay of the service employee in computing overtime pay due.

Notice to Employees

§ 4.183 Employees must be notified of compensation required.

The Act, in section 2(a)(4), and the regulations thereunder in § 4.6(e), require all contracts subject to the Act which are in excess of \$2,500 to contain a clause requiring the contractor or subcontractor to notify each employee commencing work on a contract to which the Act applies of the compensation required to be paid such employee under section 2(a)(1) and the fringe benefits required to be furnished under section 2(a)(2). A notice form (WH Publication 1313 and any applicable wage determination) provided by the Wage and Hour Division is to be used for this purpose. It may be delivered to the employee or posted as stated in § 4.184.

§ 4.184 Posting of notice.

Posting of the notice provided by the Wage and Hour Division shall be in a prominent and accessible place at the worksite, as required by § 4.6(e). The display of the notice in a place where it may be seen by employees performing on the contract will satisfy the requirement that it be in a "prominent and accessible place". Should display be necessary at more than one site, in order to assure that it is seen by such employees, additional copies of the poster may be obtained without cost from the Division. The contractor or subcontractor is required to notify each employee of the compensation due or attach to the poster any applicable wage determination specified in the contract listing all minimum monetary wages and fringe benefits to be paid or furnished to the classes of service employees performing on the contract.

Records

§ 4.185 Recordkeeping requirements.

The records which a contractor or subcontractor is required to keep concerning employment of employees subject to the Act are specified in § 4.6(g) of Subpart A of this part. They are required to be maintained for 3 years from the completion of the work, and must be made available for inspection and transcription by authorized representatives of the Administrator. Such records must be kept for each service employee performing work under the contract, for each workweek during the performance of the contract. If the required records are not separately kept for the service employees performing on the contract, it will be presumed, in the absence of affirmative proof to the contrary, that all service employees in the department or establishment where the contract was performed were engaged in covered work during the period of performance. (See § 4.179.)

§ 4.186 [Reserved]

Subpart E—Enforcement

§ 4.187 Recovery of underpayments.

(a) The Act, in section 3(a), provides that any violations of any of the contract stipulations required by sections 2(a)(1), 2(a)(2), or 2(b) of the Act, shall render the party responsible liable for the amount of any deductions, rebates, refunds, or underpayments (which includes non-payment) of compensation due to any employee engaged in the performance of the contract. So much of the accrued payments due either on the contract or on any other contract (whether subject to the Service Contract

Act or not) between the same contractor and the Government may be withheld in a deposit fund as is necessary to pay the employees. In the case of requirements-type contracts, it is the contracting agency, and not the using agencies, which has the responsibility for complying with a withholding request by the Secretary or authorized representative. The Act further provides that on order of the Secretary (or authorized representatives), any compensation which the head of the Federal agency or the Secretary has found to be due shall be paid directly to the underpaid employees from any accrued payments withheld. In order to effectuate the efficient administration of this provision of the Act, such withheld funds shall be transferred to the Department of Labor for disbursement to the underpaid employees on order of the Secretary or his or her authorized representatives, or an Administrative Law Judge, and are not paid directly to such employees by the contracting agency without the express prior consent of the Administrator. (See Decision of the Comptroller General, B-170784, February 12, 1971.) It is mandatory for a contracting officer to adhere to a request from the Department of Labor to withhold funds where such funds are available. (See Decision of the Comptroller General, B-109257, October 14, 1952, arising under the Walsh-Healey Act.) Contract funds which are or may become due a contractor under any contract with the United States may be withheld prior to the institution of administrative proceedings by the Secretary. (*McCasland v. U.S. Postal Service*, 82 CCH Labor Cases ¶ 33,607 (N.D. N.Y. 1977).)

(b) *Priority to withheld funds.*

The Comptroller General has afforded employee wage claims priority over an Internal Revenue Service levy for unpaid taxes. (See Decisions of the Comptroller General, B-170784, February 17, 1971; B-189137, August 1, 1977; 546 Comp. Gen. 499 (1977); 55 Comp. Gen. 744 (1976), arising under the Davis-Bacon Act; B-178198, August 30, 1973; B-161460, May 25, 1967.)

(1) As the Comptroller General has stated, "[t]he legislative histories of these labor statutes [Service Contract Act and Contract Work Hours and Safety Standards Act, 41 U.S.C. 327, et seq.] disclose a progressive tendency to extend a more liberal interpretation and construction in successive enactments with regard to worker's benefits, recovery and repayment of wage underpayments. Further, as remedial legislation, it is axiomatic that they are to be liberally construed." (Decision of

the Comptroller General, B-170784, February 17, 1971.)

(2) Since section 3(a) of the Act provides that accrued contract funds withheld to pay employees wages must be held in a deposit fund, it is the position of the Department of Labor that monies so held may not be used or set aside for agency procurement costs. To hold otherwise would be inequitable and contrary to public policy, since the employees have performed work from which the Government has received the benefit (see *National Surety Corporation v. U.S.*, 132 Ct. Cl. 724, 728, 135 F. Supp. 381 (1955), cert. denied, 350 U.S. 902), and to give contracting agency procurement claims priority would be to require employees to pay for the breach of contract between the employer and the agency. The Comptroller General has sanctioned priority being afforded wage underpayments over the procurement costs of the contracting agency following a contractor's default or termination for cause. Decision of the Comptroller General, B-167000, June 26, 1969; B-178198, August 30, 1973; and B-189137, August 1, 1977.

(3) Wage claims have priority over procurement costs and tax liens without regard to when the competing claims were raised. See Decisions of the Comptroller General, B-161460, May 25, 1967; B-189137, August 1, 1977.

(4) Wages due underpaid on the contract workers have priority over any assignee of the contractor, including assignments made under the Assignment of Claims Act, 31 U.S.C. 203, 41 U.S.C. 115, to funds withheld, since an assignee can acquire no greater rights to withheld funds than the assignor has in the absence of an assignment. See *Modern Industrial Bank v. U.S.*, 101 Ct. Cl. 808 (1944); *Royal Indemnity Co. v. United States*, 178 Ct. Cl. 46, 371 F. 2d 462 (1967), cert. denied, 389 U.S. 833; *Newark Insurance Co. v. U.S.*, 149 Ct. Cl. 170, 181 F. Supp. 246 (1960); *Henningsen v. United States Fidelity and Guaranty Company*, 208 U.S. 404 (1908). Where employees have been underpaid, the assignor has no right to assign funds since the assignor has no property rights to amounts withheld from the contract to cover underpayments of workers which constitute a violation of the law and the terms, conditions, and obligations under the contract. (Decision of the Comptroller General, B-164881, August 14, 1968; B-178198, August 30, 1973; 56 Comp. Gen. 499 (1977); 55 Comp. Gen. 744 (1976); *The National City Bank of Evansville v. United States*, 143 Ct. Cl. 154, 163 F. Supp. 846 (1958); *National*

Surety Corporation v. United States, 132 Ct. Cl. 724, 135 F. Supp. 381 (1955), cert. denied, 350 U.S. 902.)

(5) The Comptroller General, recognizing that unpaid laborers have an equitable right to be paid from contract retainages, has also held that wage underpayments under the Act have priority over any claim by the trustee in bankruptcy. 56 Comp. Gen. 499 (1977), citing *Pearlman v. Reliance Insurance Company*, 371 U.S. 132 (1962); *Hadden v. United States*, 132 Ct. Cl. 529 (1955), in which the courts gave priority to sureties who had paid unpaid laborers over the trustee in bankruptcy.

(c) Section 5(b) of the Act provides that if the accrued payments withheld under the terms of the contract are insufficient to reimburse all service employees with respect to whom there has been a failure to pay the compensation required pursuant to the Act, the United States may bring action against the contractor, subcontractor, or any sureties in any court of competent jurisdiction to recover the remaining amount of underpayments. The Service Contract Act is not subject to the statute of limitations in the Portal to Portal Act, 29 U.S.C. 255, and contains no prescribed period within which such an action must be instituted; it has therefore been held that the general period of six years prescribed by 28 U.S.C. 2415 applies to such actions, *United States of America v. Deluxe Cleaners and Laundry, Inc.*, 511 F. 2d 929 (C.A. 4, 1975). Any sums thus recovered by the United States shall be held in the deposit fund and shall be paid, on the order of the Secretary, directly to the underpaid employees. Any sum not paid to an employee because of inability to do so within 3 years shall be covered into the Treasury of the United States as miscellaneous receipts.

(d) Releases or waivers executed by employees for unpaid wages and fringe benefits due them are without legal effect. As stated by the Supreme Court in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 704, (1945), arising under the Fair Labor Standards Act:

"Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate."

See also *Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946); *United States v. Morley Construction Company*, 98 F. 2d 781 (C.A. 2, 1938), cert. denied, 305 U.S. 651.

Further, as noted above, monies not paid to employees to whom they are due because of violation are covered into the

U.S. Treasury as provided by section 5(b) of the Act.

(e)(1) The term "party responsible" for violations in section 3(a) of the Act is the same term as contained in the Walsh-Healey Public Contracts Act, and therefore, the same principles are applied under both Acts. An officer of a corporation who actively directs and supervises the contract performance, including employment policies and practices and the work of the employees working on the contract, is a party responsible and liable for the violations, individually and jointly with the company (*S & G Coal Sales, Inc.*, Decision of the Hearing Examiner, PC-946, January 21, 1965, affirmed by the Administrator June 8, 1965; *Tennessee Processing Co., Inc.*, Decision of the Hearing Examiner, PC-790, September 28, 1965).

(2) The failure to perform a statutory public duty under the Service Contract Act is not only a corporate liability but also the personal liability of each officer charged by reason of his or her corporate office while performing that duty. *United States v. Sencolmar Industries, Inc.*, 347 F. Supp. 404, 408 (E.D. N.Y. 1972). Accordingly, it has been held by administrative decisions and by the courts that the term "party responsible", as used in section 3(a) of the Act, imposes personal liability for violations of any of the contract stipulations required by sections 2(a)(1) and (2) and 2(b) of the Act on corporate officers who control, or are responsible for control of, the corporate entity, as they, individually, have an obligation to assure compliance with the requirements of the Act, the regulations, and the contracts. See, for example, *Waite, Inc.*, Decision of the ALJ, SCA 530-566, October 19, 1976; *Spruce-Up Corp.*, Decision of the Administrator SCA 368-370, August 19, 1976; *Ventilation and Cleaning Engineers, Inc.*, Decision of the ALJ, SCA 176, August 23, 1973; Assistant Secretary, May 17, 1974; Secretary, September 27, 1974; *Fred Van Elk*, Decision of the ALJ, SCA 254-58, May 28, 1974; Administrator, November 25, 1974; *Murcole, Inc.*, Decision of the ALJ, SCA 195-198, April 11, 1974; *Emile J. Bouchet*, Decision of the ALJ, SCA 38, February 24, 1970; *Darwyn L. Grover*, Decision of the ALJ, SCA 485, August 15, 1976; *United States v. Islip Machine Works, Inc.*, 179 F. Supp. 585 (E.D. N.Y. 1959); *United States v. Sencolmar Industries, Inc.*, 347 F. Supp. 404 (E.D. N.Y. 1972).

(3) In essence, individual liability attaches to the corporate official who is responsible for, and therefore causes or permits, the violation of the contract

stipulations required by the Act, i.e., corporate officers who control the day-to-day operations and management policy are personally liable for underpayments because they cause or permit violations of the Act.

(4) It has also been held that the personal responsibility and liability of individuals for violations of the Act is not limited to the officers of a contracting firm or to signatories to the Government contract who are bound by and accept responsibility for compliance with the Act and imposition of its sanctions set forth in the contract clauses in § 4.6, but includes all persons, irrespective of proprietary interest, who exercise control, supervision, or management over the performance of the contract, including the labor policy or employment conditions regarding the employees engaged in contract performance, and who, by action or inaction, cause or permit a contract to be breached. *U.S. v. Islip Machine Works, Inc.*, 179 F. Supp. 585 (E.D. N.Y. 1959); *U.S. v. Sencolmar Industries, Inc.*, 347 F. Supp. 404 (E.D. N.Y. 1972); *Oscar Hestrom Corp.*, Decision of the Administrator, PC-257, May 7, 1946, affirmed, *U.S. v. Hedstrom*, 8 Wage Hour Cases 302 (N.D. Ill. 1948); *Craddock-Terry Shoe Corp.*, Decision of the Administrator, PC-330, October 3, 1947; *Reynolds Research Corp.*, Decision of the Administrator, PC-381, October 24, 1951; *Etowah Garment Co., Inc.*, Decision of the Hearing Examiner, PC-632, August 9, 1957; Decision of the Administrator, April 29, 1958; *Cardinal Fuel and Supply Co.*, Decision of the Hearing Examiner, PC-890, June 17, 1963.

(5) Reliance on advice from contracting agency officials (or Department of Labor officials without the authority to issue rulings under the Act) is not a defense against a contractor's liability for back wages under the Act. *Standard Fabrication Ltd.*, Decision of the Secretary, PC-297, August 3, 1948; *Airport Machining Corp.*, Decision of the ALJ, PC-1177, June 15, 1973; *James D. West*, Decision of the ALJ, SCA 397-398, November 17, 1975; *Metropolitan Rehabilitation Corp.*, WAB Case No. 78-25, August 2, 1979; *Fry Brothers Corp.*, WAB Case No. 76-8, June 14, 1977.

(f) The appellate rights of a contractor or subcontractor regarding violations of the Act, including back wage liability or the disposition of funds withheld by the agency for such liability are contained in Part 6 of this Title. Appeals in such matters have not been delegated to the contracting agencies and such matters

cannot be appealed under the disputes clause in the contractor's contract.

(g) While the Act provides that action may be brought against a surety to recover underpayments of compensation, there is no statutory provision requiring that contractors furnish either payment or performance bonds before an award can be made. The courts have held, however, that when such a bond has been given, including one denominated as a performance rather than payment bond, and such a bond guarantees that the principal shall fulfill "all the undertakings, covenants, terms, conditions, and agreements" of the contract, or similar words to the same effect, the surety-guarantor is jointly liable for underpayments by the contractor of the wages and fringe benefits required by the Act up to the amount of the bond. *U.S. v. Powers Building Maintenance Co.*, 366 F. Supp. 819 (W.D. Okla. 1972); *U.S. v. Gillespie*, 72 CCH Labor Cases ¶ 33,986 (C.D. Cal. 1973) *U.S. v. Glens Falls Insurance Co.*, 279 F. Supp. 236 (E.D. Tenn. 1967); *United States v. Hudgins-Dize Co.*, 83 F. Supp. 593 (E.D. Va. 1949); *U.S. v. Continental Casualty Company*, 85 F. Supp. 573 (E.D. Pa. 1949), affirmed per curiam, 182 F.2d 941 (3rd Cir. 1950).

§ 4.188 Ineligibility for further contracts when violations occur.

(a) Section 5 of the Act directs the Comptroller General to distribute a list to all agencies of the Government giving the names of persons or firms that the Federal agencies or the Secretary has found violated this Act. Unless the Secretary otherwise recommends because of unusual circumstances, no contract of the United States or the District of Columbia (whether or not subject to the Act) shall be awarded to the persons or firms appearing on this list or to any firm, corporation, partnership, or association in which such persons or firms have a substantial interest until 3 years have elapsed from the date of publication of the list containing the names of such persons or firms. This prohibition against the award of a contract to an ineligible contractor applies to the contractor in its capacity as either a prime contractor or a subcontractor. Because the Act contains no provision authorizing removal from the list of the names of such persons or firms prior to the expiration of the three-year statutory period, the Secretary is without authority to accomplish such removal (other than in situations involving mistake or legal error). On the other hand, there may be situations in which persons or firms already on the list are

found in a subsequent administrative proceeding to have again violated the Act and their debarment ordered. In such circumstances, a new, three-year debarment term will commence with the republication of such names on the list.

(b)(1) The term "unusual circumstances" is not defined in the Act. Accordingly, the determination must be made on a case-by-case basis in accordance with the particular facts present. It is clear, however, that the effect of the 1972 Amendments is to limit the Secretary's discretion to relieve violators from the debarred list (H. Rept. 92-1251, 92d Cong., 2d Sess. 5; S. Rept. 92-1131, 92d Cong., 2d Sess. 3-4) and that the violator of the Act has the burden of establishing the existence of unusual circumstances to warrant relief from the debarment sanction. *Ventilation and Cleaning Engineers, Inc.*, SCA-176, Administrative Law Judge, August 23, 1973, Assistant Secretary, May 22, 1974, Secretary, October 2, 1974. It is also clear that unusual circumstances do not include any circumstances which would have been insufficient to relieve a contractor from the ineligible list prior to the 1972 amendments, or those circumstances which commonly exist in cases where violations are found, such as negligent or willful disregard of the contract requirements and of the Act and regulations, including a contractor's plea of ignorance of the Act's requirements where the obligation to comply with the Act is plain from the contract, failure to keep necessary records and the like. *Emerald Maintenance Inc.*, Supplemental Decision of the ALJ, SCA-153, April 5, 1973.

(2) The Subcommittee report following the oversight hearings conducted just prior to the 1972 amendments makes it plain that the limitation of the Secretary's discretion through the unusual circumstances language was designed in part to prevent the Secretary from relieving a contractor from the ineligible list provisions merely because the contractor paid what he was required by his contract to pay in the first place and promised to comply with the Act in the future. See, House Committee on Education and Labor, Special Subcommittee on Labor, The Plight of Service Workers under Government Contracts 12-13 (Comm. Print 1971). As Congressman O'Hara stated: "Restoration . . . [of wages and benefits] is not in and of itself a penalty. The penalty for violation is the suspension from the right to bid on Government contracts The authority [to relieve from blacklisting] was intended to be used in situations

where the violation was a minor one, or an inadvertent one, or one in which disbarment . . . would have been wholly disproportionate to the offense." House Committee on Education and Labor, Special Subcommittee on Labor, Hearings on H.R. 6244 and H.R. 6245, 92d Cong., 1st Sess. 3 (1971).

(3)(i) The Department of Labor has developed criteria for determining when there are unusual circumstances within the meaning of the Act. See, e.g., *Washington Moving & Storage Co.*, Decision of the Assistant Secretary, SCA 68, August 16, 1973, Secretary, March 12, 1974; *Quality Maintenance Co.*, Decision of the Assistant Secretary, SCA 119, January 11, 1974. Thus, where the respondent's conduct in causing or permitting violations of the Service Contract Act provisions of the contract is willful, deliberate or of an aggravated nature or where the violations are a result of culpable conduct such as culpable neglect to ascertain whether practices are in violation, culpable disregard of whether they were in violation or not, or culpable failure to comply with recordkeeping requirements (such as falsification of records), relief from the debarment sanction cannot be in order. Furthermore, relief from debarment cannot be in order where a contractor has a history of similar violations, where a contractor has repeatedly violated the provisions of the Act, or where previous violations were serious in nature.

(ii) A good compliance history, cooperation in the investigation, repayment of moneys due, and sufficient assurances of future compliance are generally prerequisites to relief. Where these prerequisites are present and none of the aggravated circumstances in the preceding paragraph exist, a variety of factors must still be considered, including whether the contractor has previously been investigated for violations of the Act, whether the contractor has committed recordkeeping violations which impeded the investigation, whether liability was dependent upon resolution of a bona fide legal issue of doubtful certainty, the contractor's efforts to ensure compliance, the nature, extent, and seriousness of any past or present violations, including the impact of violations on unpaid employees, and whether the sums due were promptly paid.

(4) A contractor has an affirmative obligation to ensure that its pay practices are in compliance with the Act, and cannot itself resolve questions which arise, but rather must seek advice

from the Department of Labor. *Marcole, Inc.*, Decision of the ALJ, SCA 195-198, April 10, 1974; *McLaughlin Storage, Inc.*, Decision of the ALJ, SCA 362-365, November 5, 1975, Administrator, March 25, 1976; *Able Building & Maintenance & Service Co.*, Decision of the ALJ, SCA 389-390, May 29, 1975, Assistant Secretary, January 13, 1976; *Aarid Van Lines, Inc.*, Decision of the Administrator, SCA 423-425, May 13, 1977.

(5) Furthermore, a contractor cannot be relieved from debarment by attempting to shift his/her responsibility to subordinate employees. *Security Systems, Inc.*, Decision of the ALJ, SCA 774-775, April 10, 1976; *Ventilation & Cleaning Engineers, Inc.*, Decision of the Secretary, SCA 176, September 27, 1974; *Ernest Roman*, Decision of the Secretary, SCA 275, May 6, 1977. As the Comptroller General has stated in considering debarment under the Davis-Bacon Act, "[n]egligence of the employer to instruct his employees as to the proper method of performing his work or to see that the employee obeys his instructions renders the employer liable for injuries to third parties resulting therefrom. . . . The employer will be liable for acts of his employee within the scope of the employment regardless of whether the acts were expressly or impliedly authorized. . . . Willful and malicious acts of the employee are imputable to the employer under the doctrine of respondeat superior although they might not have been consented to or expressly authorized or ratified by the employer." (Decision of the Comptroller General, B-145608, August 1, 1961.)

(6) Negligence per se does not constitute unusual circumstances. Relief on no basis other than negligence would render the effect of section 5(a) a nullity, since it was intended that only responsible bidders be awarded Government contracts. *Greenwood's Transfer & Storage, Inc.*, Decision of the Secretary, SCA 321-326, June 1, 1976; *Ventilation & Cleaning Engineers, Inc.*, Decision of the Secretary, SCA 176, September 27, 1974.

(c) Similarly, the term "substantial interest" is not defined in the Act. Accordingly, this determination, too, must be made on a case-by-case basis in light of the particular facts, and cognizant of the legislative intent "to provide to service employees safeguards similar to those given to employees covered by the Walsh-Healey Public Contracts Act". *Federal Food Services, Inc.*, Decision of the ALJ, SCA 585-582, November 22, 1977. Thus, guidance can be obtained from cases arising under the

Walsh-Healey Act, which uses the concept "controlling interest". See *Regal Mfg. Co.*, Decision of the Administrator, PC-245, March 1, 1946; *Acme Sportswear Co.*, Decision of the Hearing Examiner, PC-275, May 8, 1946; *Gearcraft, Inc.*, Decision of the ALJ, PCX-1, May 3, 1972. In a supplemental decision of February 23, 1979, in *Federal Food Services, Inc.* the Judge ruled as a matter of law that the term "does not preclude every employment or financial relationship between a party under sanction and another . . . [and that] it is necessary to look behind titles, payments, and arrangements and examine the existing circumstances before reaching a conclusion in this matter."

(1) Where a person or firm has a direct or beneficial ownership or control of more than 5 percent of any firm, corporation, partnership, or association, a "substantial interest" will be deemed to exist. Similarly, where a person is an officer or director in a firm or the debarred firm shares common management with another firm, a "substantial interest" will be deemed to exist. Furthermore, wherever a firm is an affiliate as defined in § 4.1a(g) of Subpart A, a "substantial interest" will be deemed to exist, or where a debarred person forms or participates in another firm in which he/she has comparable authority, he/she will be deemed to have a "substantial interest" in the new firm and such new firm would also be debarred (*Etowah Garment Co., Inc.*, Decision of the Hearing Examiner, PC-632, August 9, 1957).

(2) Nor is interest determined by ownership alone. A debarred person will also be deemed to have a "substantial interest" in a firm if such person has participated in contract negotiations, is a signatory to a contract, or has the authority to establish, control, or manage the contract performance and/or the labor policies of a firm. A "substantial interest" may also be deemed to exist, in other circumstances, after consideration of the facts of the individual case. Factors to be examined include, among others, sharing of common premises or facilities, occupying any position such as manager, supervisor, or consultant to, any such entity, whether compensated on a salary, bonus, fee, dividend, profit-sharing, or other basis of remuneration, including indirect compensation by virtue of family relationships or otherwise. A firm will be particularly closely examined where there has been an attempt to sever an association with a debarred firm or where the firm was formed by a person previously affiliated

with the debarred firm or a relative of the debarred person.

(3) Firms with such identity of interest with a debarred person or firm will be placed on the debarred bidders list after the determination is made pursuant to procedures in Part 6, Subpart A, or § 4.12 and Part 6, Subpart D. Where a determination of such "substantial interest" is made after the initiation of the debarment period, contracting agencies are to terminate any contract with such firm entered into after the initiation of the original debarment period since all persons or firms in which the debarred person or firm has a substantial interest are also ineligible to receive Government contracts.

§ 4.189 Administrative proceedings relating to enforcement of labor standards.

The Secretary is authorized pursuant to the provisions of section 4(a) of the Act to hold hearings and make decisions based upon findings of fact as are deemed to be necessary to enforce the provisions of the Act. Pursuant to section 4(a) of the Act, the Secretary's findings of fact after notice and hearing are conclusive upon all agencies of the United States and, if supported by the preponderance of the evidence, conclusive in any court of the United States, without a trial de novo. *United States v. Powers Building Maintenance Co.*, 336 F. Supp. 819 (W.D. Okla. 1972). Rules of practice for administrative proceedings are set forth in Part 6 of this Title.

§ 4.190 Contract cancellation.

(a) As provided in section 3 of the Act, where a violation is found of any contract stipulation, the contract is subject upon written notice to cancellation by the contracting agency, whereupon the United States may enter into other contracts or arrangements for the completion of the original contract, charging any additional cost to the original contractor.

(b) Every contractor shall certify pursuant to § 4.6(n) of Subpart A that it is not disqualified for the award of a contract by virtue of its name appearing on the debarred bidders list or because any such currently listed person or firm has a substantial interest in said contractor, as described in § 4.188. Upon discovery of such false certification or determination of substantial interest in a firm performing on a Government contract, as the case may be, the contract is similarly subject upon written notice to immediate cancellation by the contracting agency and any additional cost for the completion of the contract charged to the original contractor as specified in paragraph (a),

supra. Such contract is without warrant of law and has no force and effect and is void ab initio, 33 Comp Gen. 63; Decision of the Comptroller General, B-115051, August 6, 1953. Furthermore, any profit derived from said illegal contract is forfeited (*Paisner v. U.S.*, 138 Ct. Cl. 420, 150 F. Supp. 835 (1957), cert. denied, 355 U.S. 941.)

§ 4.191 Complaints and compliance assistance.

(a) Any employer, employee, labor or trade organization contracting agency, or other interested person or organization may report to any office of the Wage and Hour Division (or to any office of the Occupational Safety and Health Administration, in instances involving the safety and health provisions), a violation, or apparent violation, of the Act, or of any of the rules or regulations prescribed thereunder. Such offices are also available to assist or provide information to contractors or subcontractors desiring to insure that their practices are in compliance with the Act. Information furnished is treated confidentially. It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of an employee who makes a confidential written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal his identity, will not be disclosed without the prior consent of the employee. Disclosure of employee statements shall be governed by the provisions of the "Freedom of Information Act" (5 U.S.C. 552, see 29 CFR Part 70) and the "Privacy Act of 1974" (5 U.S.C. 552a).

(b) A report of breach or violation relating solely to safety and health requirements may be in writing and addressed to the Regional Administrator of an Occupational Safety and Health Administration Regional Office, U.S. Department of Labor, or to the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, D.C. 20210.

(c) Any other report of breach or violation may be in writing and addressed to the Assistant Regional Administrator of a Wage and Hour Division's regional office, U.S. Department of Labor, or to the Administrator of the Wage and Hour Division, U.S. Department of Labor, Washington, D.C. 20210.

(d) In the event that an Assistant Regional Administrator for the Wage and Hour Division, Employment Standards Administration, is notified of

a breach or violation which also involves safety and health standards, the Regional Administrator of the Employment Standards Administration shall notify the appropriate Regional Administrator of the Occupational Safety and Health Administration who shall with respect to the safety and health violation take action commensurate with his responsibilities pertaining to safety and health standards.

(e) Any report should contain the following:

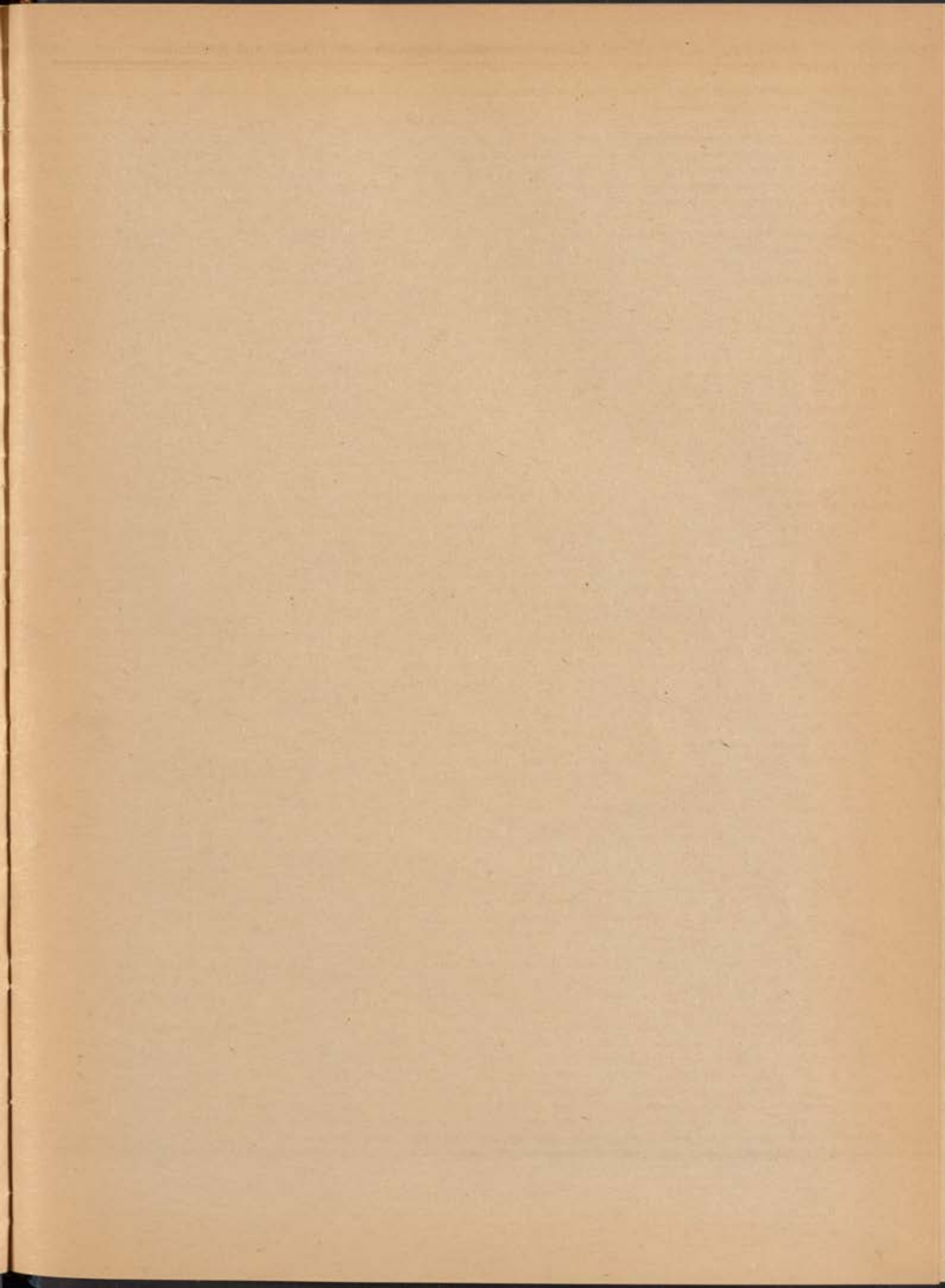
(1) The full name and address of the person or organization reporting the breach or violations.

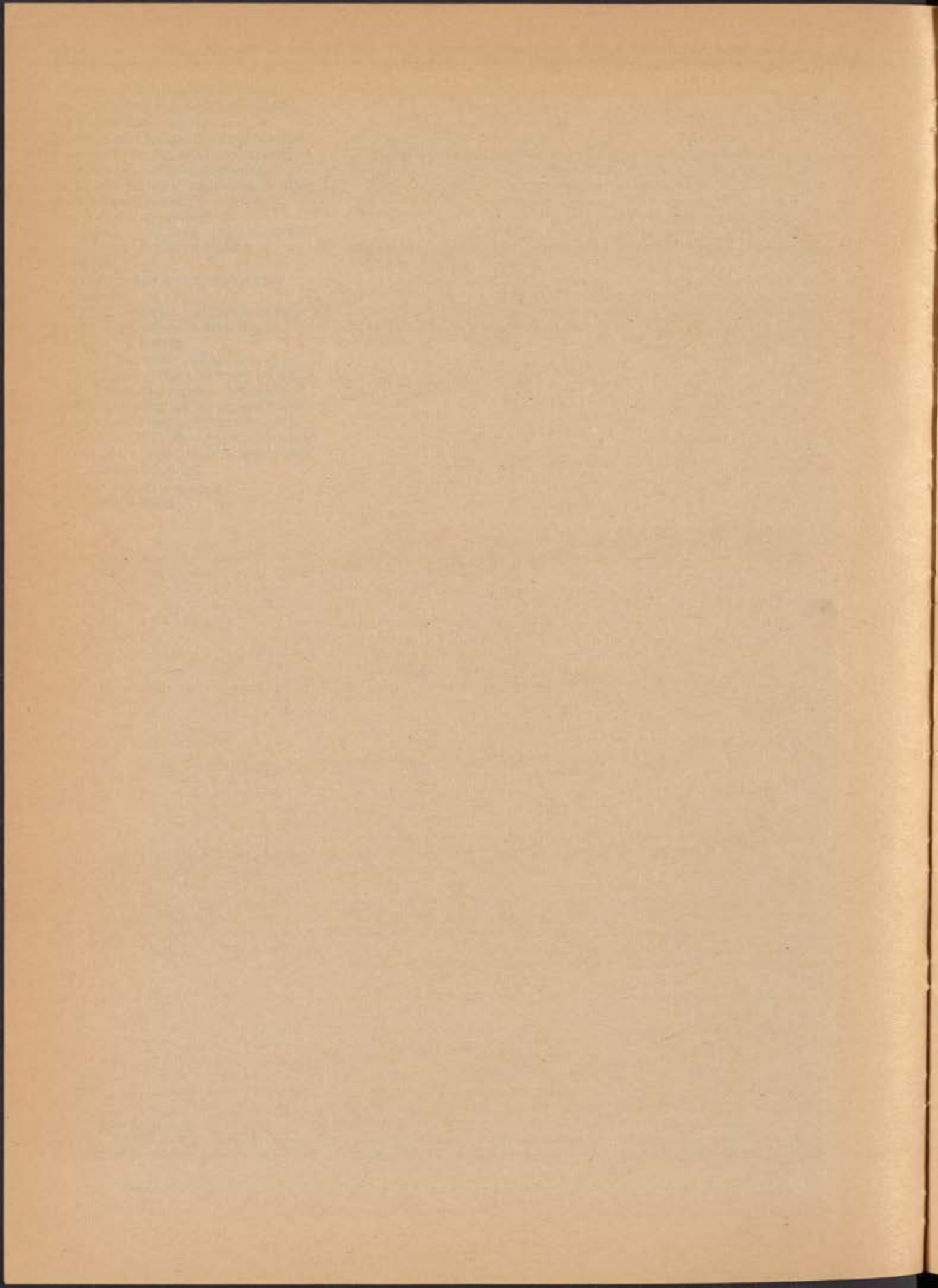
(2) The full name and address of the person against whom the report is made.

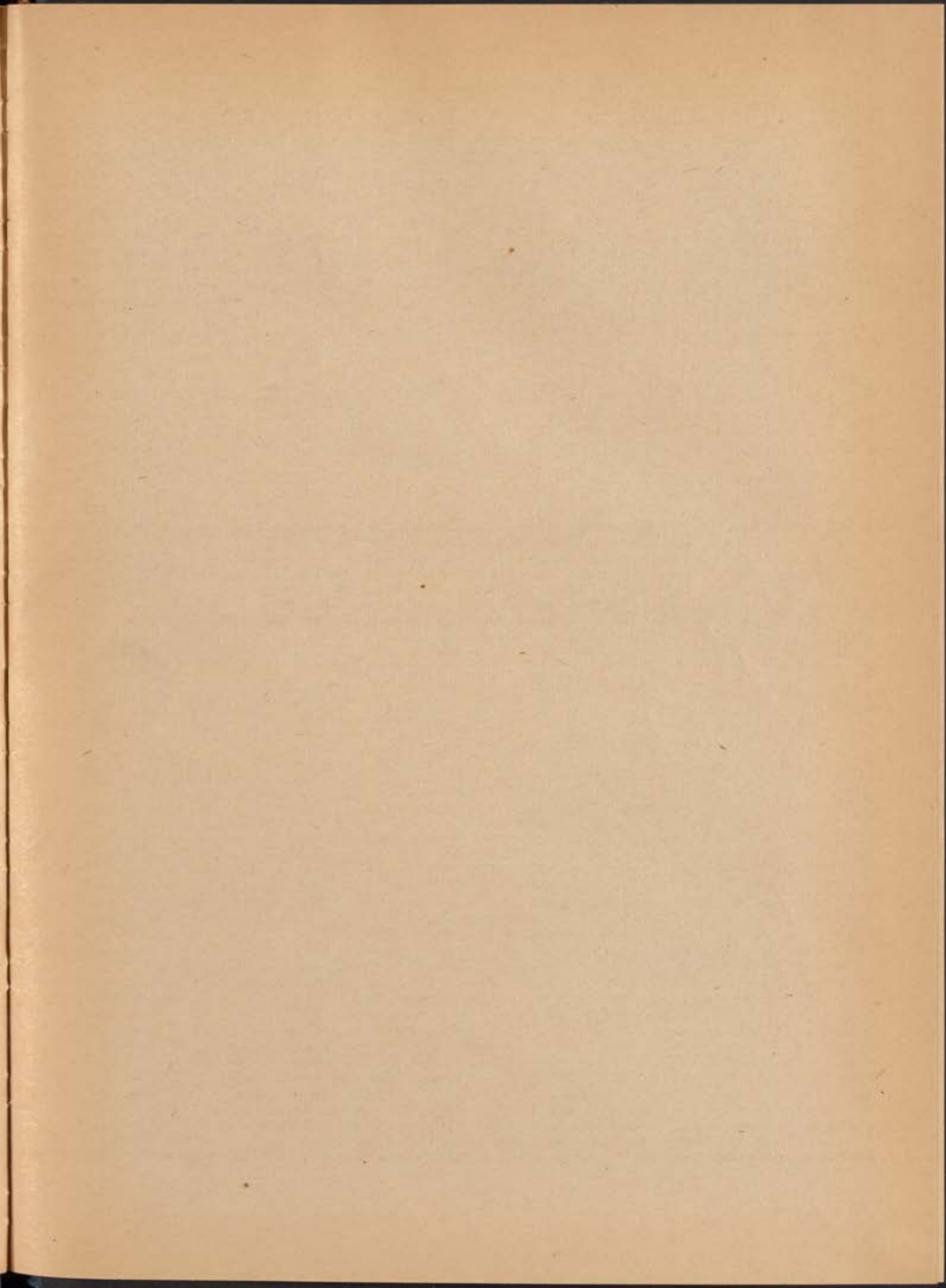
(3) A clear and concise statement of the facts constituting the alleged breach or violation of any of the provisions of the McNamara-O'Hara Service Contract Act, or of any of the rules or regulations prescribed thereunder.

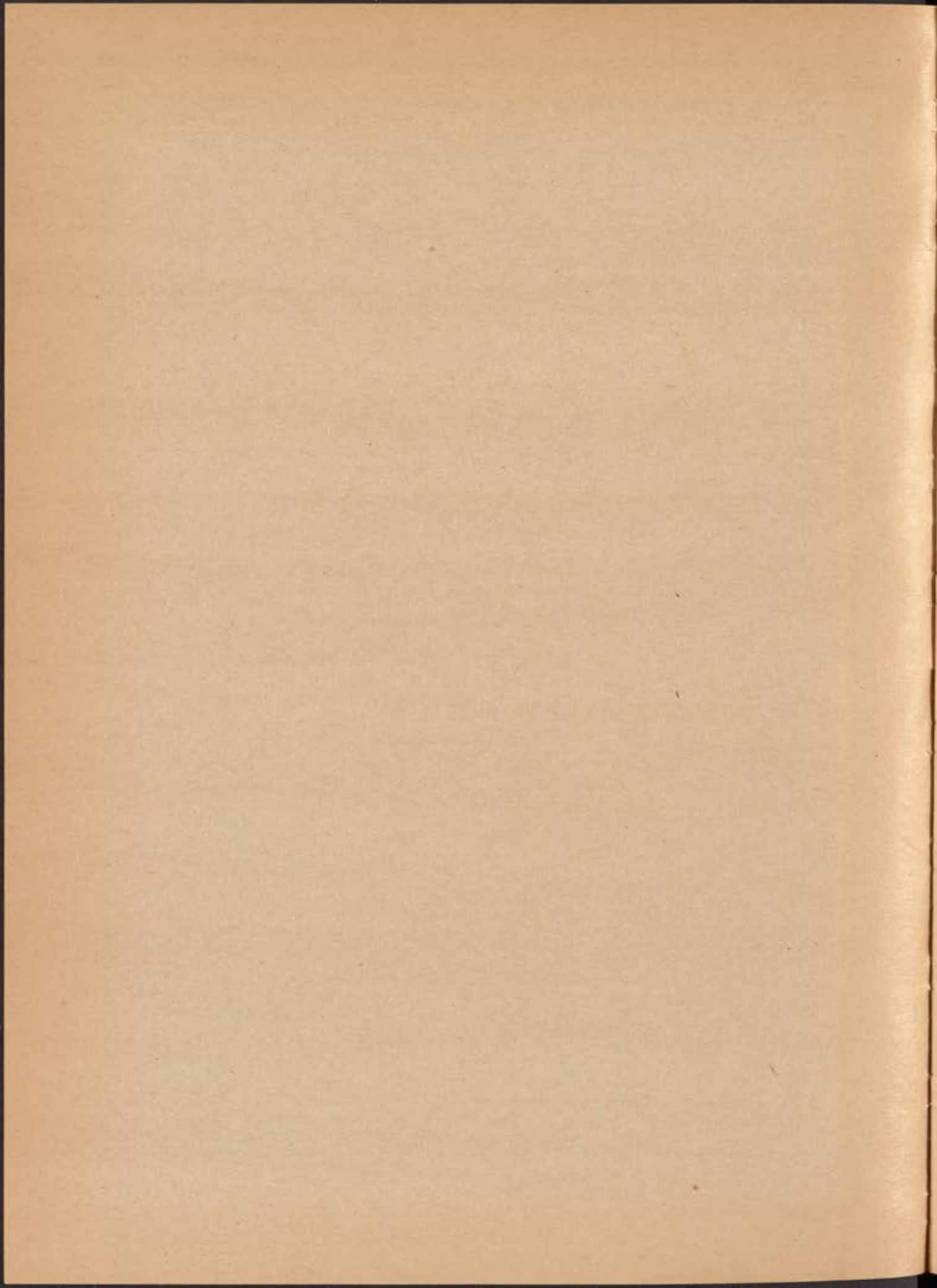
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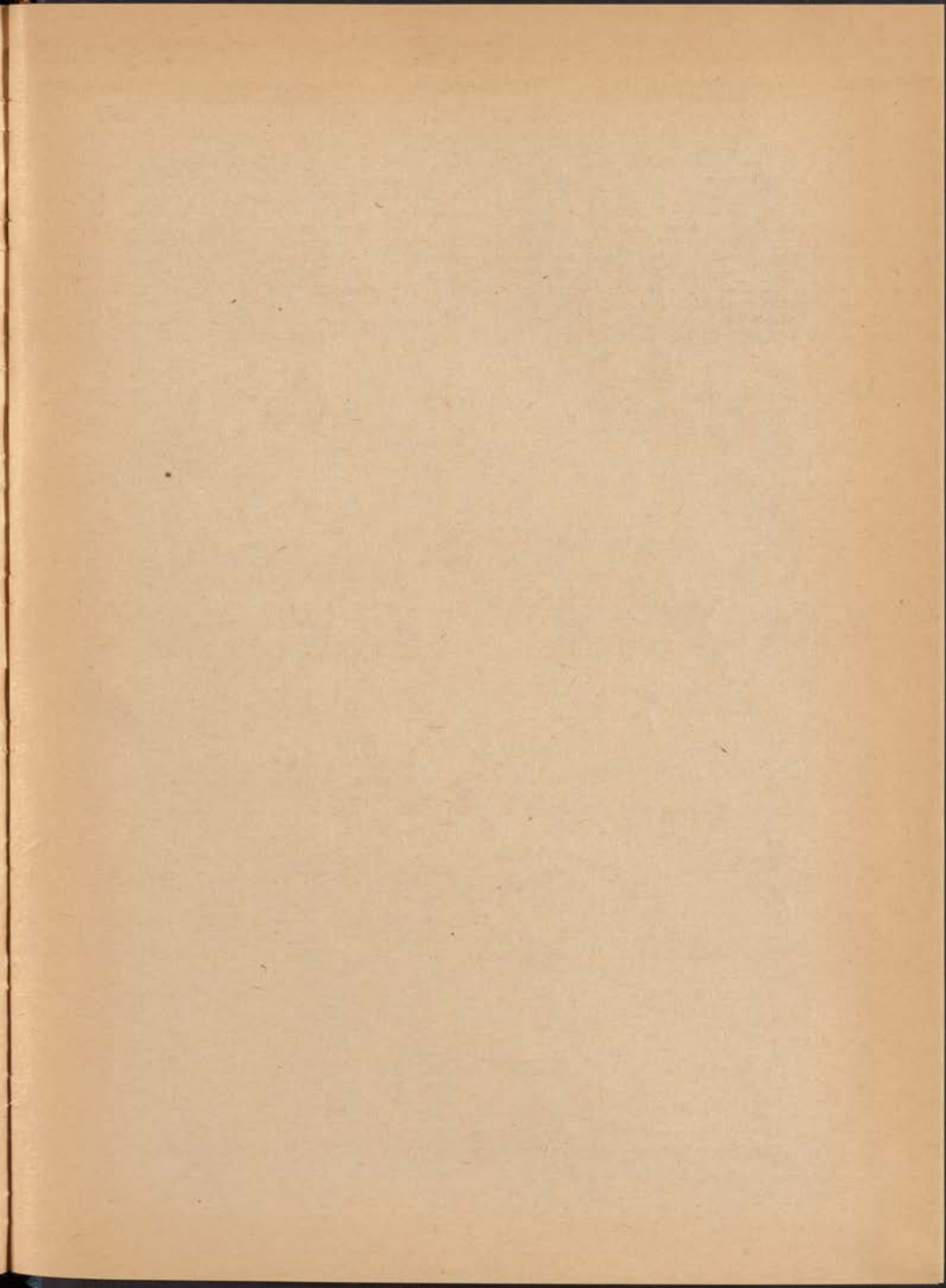
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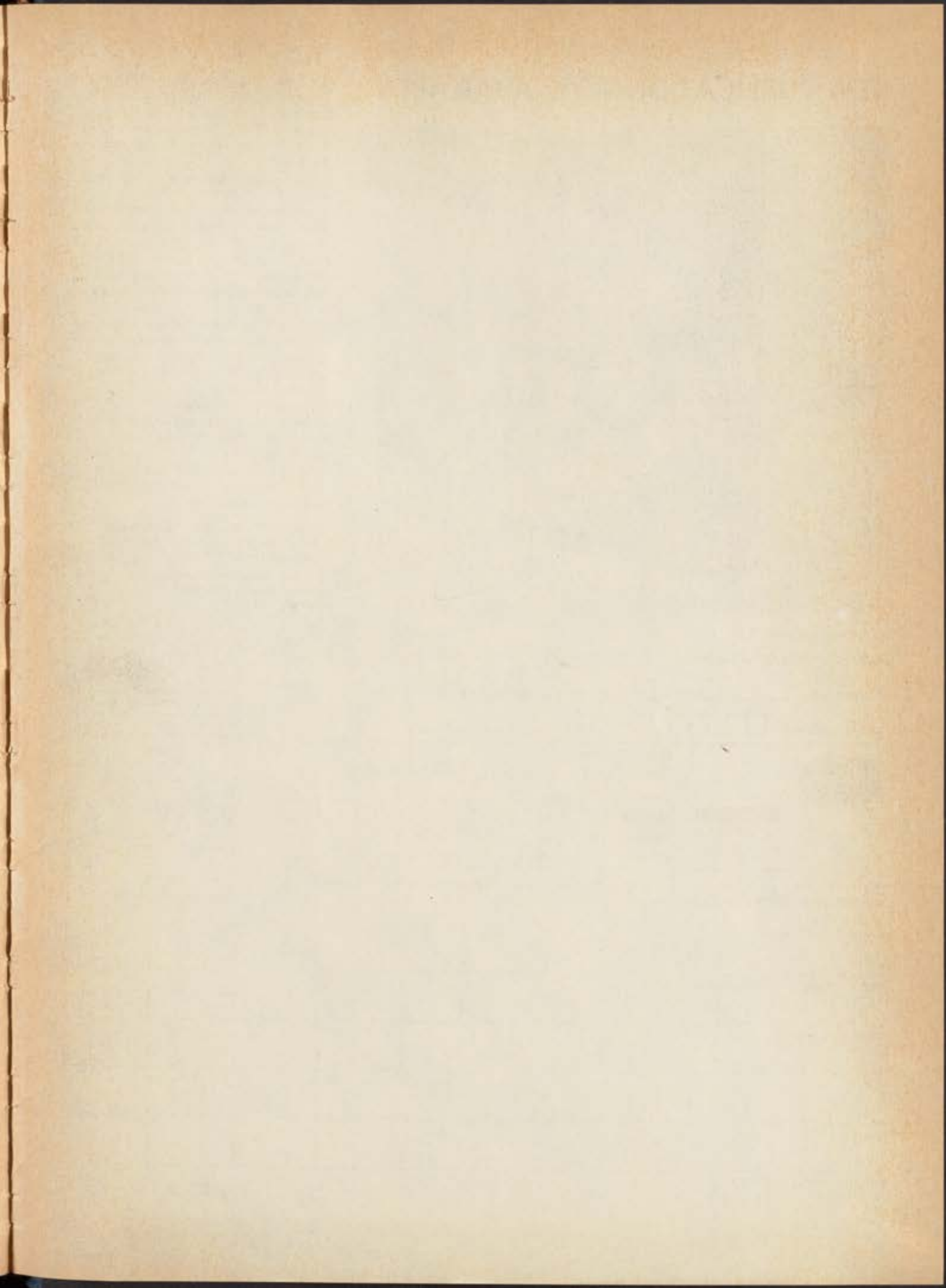




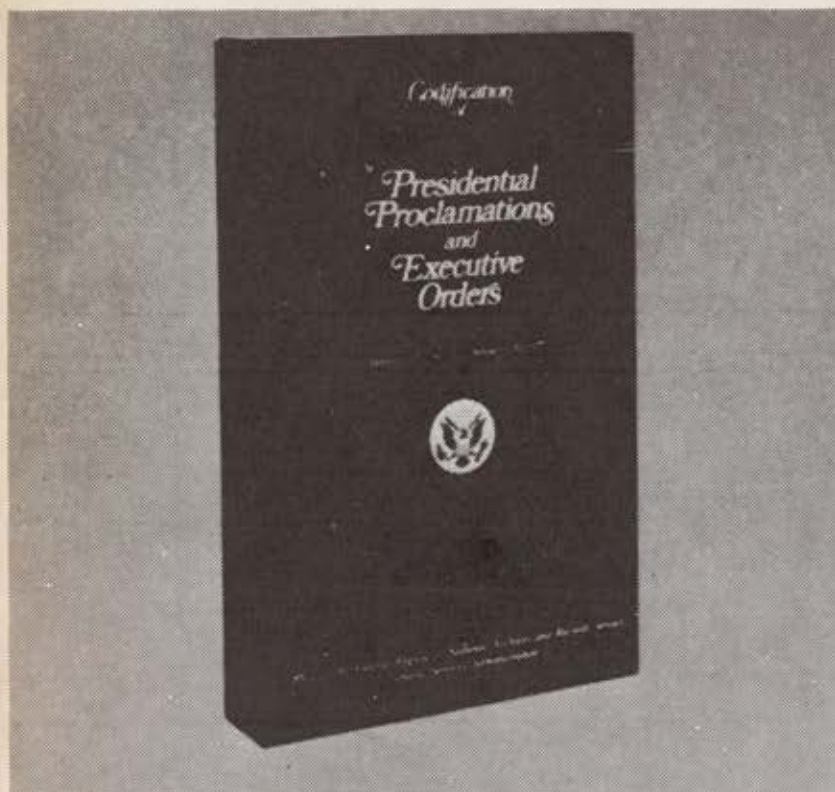








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Published by the Office of the Federal Register,
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General Services Administration

Order from Superintendent of Documents,
U.S. Government Printing Office,
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federal register

Book 3 of 3 Books Friday, January 16, 1981

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Construction (Also Labor Standards Provisions
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DEPARTMENT OF LABOR**Employment Standards
Administration, Wage and Hour
Division****29 CFR Part 5****Labor Standards Provisions Applicable
to Contracts Covering Federally
Financed and Assisted Construction
(Also Labor Standards Provisions
Applicable to Nonconstruction
Contracts Subject to the Contract
Work Hours and Safety Standards Act)**

AGENCY: Wage and Hour Division,
Employment Standards Administration,
Labor.

ACTION: Final rule.

SUMMARY: This document provides the final Regulations, 29 CFR Part 5, Subpart A, pertaining to labor standards applicable to contracts for Federally financed and assisted construction and to contracts subject to the Contract Work Hours and Safety Standards Act. Changes have been made in the contract labor standard clauses which are required to be included in such construction contracts, and provision has been made for withholding of funds due a contractor on other Federal and Federally assisted contracts in situations where laborers or mechanics have not been paid in compliance with the law and insufficient monies remain under the contract on which such violations occurred. Apprenticeship requirements have also been revised. Other changes have been made in debarment and enforcement procedures, and in the procedure for adding wage rates for classifications of workers which have been omitted from the prevailing wage determination applicable to the contract. Changes have also been made to preclude a debarred contractor from becoming either a contractor or a subcontractor on other Federal or Federally assisted projects, and to reduce the number of reports that contracting agencies must submit to the Department of Labor.

EFFECTIVE DATE: February 17, 1981.

FOR FURTHER INFORMATION CONTACT:
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Department of Labor, Room S-3502, 200
Constitution Avenue, NW, Washington,
D.C. 20210, telephone: (202) 523-8333.

SUPPLEMENTARY INFORMATION: On
December 28, 1979, a proposal was
published in the Federal Register (44 FR
77080) to make certain revisions to
Subpart A of Regulations, 29 CFR Part 5.
Labor Standards Provisions Applicable
to Contracts Covering Federally

Financed and Assisted Construction
(Also Labor Standards Provisions
Applicable to Nonconstruction
Contracts Subject to the Contract Work
Hours and Safety Standards Act). The
purpose of these changes was to revise,
update, and clarify this subpart.

Interested persons were afforded the
opportunity to submit comments to the
Wage and Hour Division within 60 days
after publication of the notice in the
Federal Register. Subsequently, on
February 15 and April 1, 1980, notice
was given in the Federal Register
extending the dates for submission of
comments to March 27 and May 27,
1980, respectively. The first extension
was granted at the request of various
interested parties who needed
additional time to prepare their
comments. The second extension was
granted in order to allow the comment
period to run concurrently with that for
the related procedural rules in revised
Part 6 of this Title, published in
proposed form on April 22, 1980.

Comments were received from
approximately 246 interested parties,
which included contracting agencies,
contractor associations, contractors,
labor unions and organizations, State
and local governmental bodies, business
organizations, law firms and individuals.
In addition, the General Accounting
Office submitted comments on the
proposed regulations. Among those
Federal agencies submitting comments
were the Department of Defense, the
Federal Highway Administration, the
General Services Administration, the
Department of Energy, the National
Aeronautics and Space Administration,
the Logistics Service and the Office of
Airport Planning and Programming of
the Federal Aviation Administration,
and the Department of Housing and
Urban Development. Contractor
associations and business organizations
submitting comments included the
Associated General Contractors of
America, the Associated Builders and
Contractors, Inc., the National
Association of Home Builders, the
Chamber of Commerce of the United
States, the National Association of
Manufacturers, and the Business
Roundtable. Labor unions and
organizations commenting on the
proposal included the Building and
Construction Trades Department of the
American Federation of Labor—
Congress of Industrial Organizations
(whose comments were endorsed by the
Center to Protect Worker's Rights) and
the International Brotherhood of
Electrical Workers.

While some requests for public
hearings were made, it was decided,

after careful consideration that, in view
of the broad range of the responses and
issues addressed, such hearings would
be redundant.

It has been determined that the
amendments to these Regulations do not
meet the criteria of Executive Order
12044 and the Department of Labor
Guidelines (44 FR 5570) for a regulatory
analysis. These regulations will not, in
our opinion, cause major cost/price
increases.

The following is an analysis of all the
principal comments received and the
concomitant changes made to the
proposed rule. Each submission has
been thoroughly reviewed, and each
criticism and suggestion has been given
careful consideration. For each section
and, where appropriate, subsection of
the final rule, the analysis contains a
description of the major comments and
recommendations, the Department's
findings as to whether or not suggested
changes to the proposed rule would be
in accordance with the statutory
language and intent of the Davis-Bacon
Act, the Contract Work Hours and
Safety Standards Act, and the Copeland
Act, as appropriate, and the substantive
changes herein adopted.

Discussion of Major Comments**Definitions (§ 5.2(a)-(r))**

Comments were received concerning
the definitions of the terms "contract";
"construction", "prosecution",
"completion", or "repair"; "site of
work"; "laborer" or "mechanic";
"apprentice" and "trainee"; "employed";
"wage determination"; and "any
affiliated person".

A number of comments received from
State and local Governments reflected a
misunderstanding of the intent of our
revisions to the definition of "contract".
The revision does not extend coverage
to State and local Government
employees. There are, however, certain
statutes which require the payment of
Davis-Bacon prevailing wage rates to
the recipient State and local
Government's employees who are
performing the construction work. For
example, the U.S. Housing Act of 1937
requires the payment of the Davis-
Bacon prevailing wage rates to all
laborers or mechanics employed in the
development of the project, including
employees of the recipient local
Government. Accordingly, we have
amended the proposed regulations to
clarify this term with respect to the
application of prevailing wage
standards to State and local
Governmental employees.

Questions were raised as to whether
the definition of the terms
"construction", "prosecution",

"completion", or "repair" included the on-site installation of items fabricated off-site. Therefore, this subsection has been amended to include language to make it clear that on-site installation involving construction is within the meaning of these terms. In addition, as requested by the Federal Highway Administration, the citation for the Federal-Aid Highway Act of 1956 was changed.

Several comments were received objecting to the inclusion within the definition of "site of work" of such facilities as fabrication plants, mobile factories, batch plants, borrow pits, job headquarters, tool yards, etc., which are dedicated exclusively, or nearly so, to a particular contract and are located in close proximity to the actual location of construction. Contrary to the understanding of many of the commenters, we are not extending the scope of this definition. Rather, we are including in the regulations the Department's long-standing position with respect to the definition of this term which has been upheld by the Department's Wage Appeals Board. In this regard, it should be noted that the General Accounting Office has indicated that, despite its prior rulings on this issue, it does not object to the proposed definition of this term.

Numerous commenters objected to including working foremen in the definition of the term "laborer" or "mechanic" on the basis that "supervisors" and "foremen" should be excluded as part of management. Normally, anyone who performs duties which are manual or physical on a covered project is a "laborer" or "mechanic" during the time so spent. However, recognizing the realities of the construction industry and the fact that some employees are assigned managerial duties, it was decided to adopt a reasonable tolerance by applying a percentage limitation test on the amount of time which could be spent performing such non-managerial duties, after which working foremen would be considered "laborers or mechanics" for purposes of the Davis-Bacon Act. The language on working foremen and the 20 percent limitation on such work simply codify a long-standing policy of the Department which was adopted to accommodate the needs of the industry without ignoring the remedial purposes of the statute to protect the wages of the workers.

There were several comments concerning the definitions of the terms "apprentice" and "trainee". First, there were comments disapproving of the requirement that apprenticeship and

training programs be registered with the Bureau of Apprenticeship and Training or with a State apprenticeship agency recognized by BAT. Numerous commenters shared the opinion that the policy of permitting only employment of apprentices and trainees under BAT approved programs was denying job opportunities to youths, minorities, and women. In addition, several parties recommended that changes be made in this subsection to reflect the provisions of 23 U.S.C. 113(c) which exempt apprentices and trainees certified by the Secretary of Transportation, rather than the Secretary of Labor, on Federal-Aid Highway projects, from the required payment of prevailing wage rates.

The Davis-Bacon Act requires that all laborers and mechanics be paid the applicable prevailing wage rate for the classification of work performed. However, in an effort to encourage meaningful training of workers in the construction industry, which will provide a ready and stable reservoir of skilled workers, the Department of Labor permits the use of apprentices and trainees at less than the required applicable predetermined rate for the work performed, where the apprentices and trainees are enrolled in training programs approved in accordance with the requirements of the Bureau of Apprenticeship and Training, or, with respect to apprentices, a similar State agency approved by BAT. We do this because we are assured that the training is real and is not a subterfuge to freeze young, minority, and female workers into low paying unskilled jobs. It should be stressed that the provisions allowing for the payment of less than the prevailing wage rates to apprentices and trainees is an exception to the requirements of the Davis-Bacon Act (see *Geyvyn Construction Corporation v. United States*, No. 515-78 (Ct. Cl., September 12, 1980)) and that strict conditions must be maintained in order to prevent the circumvention of the Act's requirements, especially in the case of the young, minority, and female worker against whom job and wage discrimination might otherwise be widespread.

Contrary to some of the opinions expressed that the registration requirements deny employment opportunities to youths, minorities, and women, participation in apprenticeship and training programs is available to all of these groups.

The suggestions with respect to 23 U.S.C. section 113(c) have been implemented.

A number of commenters opposed including the phrase "regardless of any contractual relationship alleged to exist

between the contractors or such person" in the definition of the term "employed". They argue that such language would encompass bona fide subcontractors and it was their belief that such language was only meant to apply to alleged subcontractors who are in fact employees. The phrase in question is required by the statute itself. Furthermore, the argument of these commenters was considered and rejected by the Attorney General (41 Op. Atty. Gen. 488 (1960)), who concluded that Congress intended to preserve the benefits of the Act for all engaged in laborer's or mechanic's work, whether they are independent contractors or employees.

There were objections to the deletion of the language "issued prior to the award of the contract" which had been contained in the previous definition of the term "wage determination" because it was felt that this change would give the Department "carte blanche" authority to change the wage determination in the contract after award. These comments are discussed together with the rules regarding application of wage determinations in Part 1 of this title.

Concern was expressed that the term "any affiliated person" would extend debarment to members of a contractor's immediate family who were not responsible for the violations which led to the debarment. This term was included in the text of the proposed subsection because of the Department's original intention to incorporate the existing Part 3 of this Title (concerning allowable deductions under the Copeland Act), where the term "affiliated person" is defined, as Subpart D of this Part. However, since the publication of Subpart D will be delayed, we are deleting this subsection and any concern of parties who have an interest in this issue should be dispelled.

Contract Provisions and Related Matters (Section 5.5)

Objections were raised to the deletion of former language allowing contracting agencies to insert modifications to the Davis-Bacon labor standards contract clauses to meet the particular needs of the agency, if first approved by the Department of Labor. Upon reconsideration, we have decided that the objections are valid and we are adding language to allow for the above.

Several parties took exception to the addition of the language "without regard to skill" in § 5.5(a)(1)(i), which deals with the issue of wage payments for laborers and mechanics. In addition, a suggestion was made to add language to make it clear that laborers and

mechanics performing work in more than one classification should receive the applicable rate for the time spent performing work in each classification. The addition of the phrase "without regard to skill" makes clear to the public the Department's long-standing policy on the minimum payment due to laborers or mechanics working in a given classification. There is no prohibition under the Davis-Bacon Act against payment of a higher rate than that found to be prevailing if the contractor wishes to recognize a worker's special skill. This policy has been upheld in administrative hearings and by the Wage Appeals Board. As suggested, we have added language to this subsection to reflect that laborers and mechanics must be paid the applicable prevailing wage rate for the classification of work performed.

A substantial number of comments were received concerning the provisions of § 5.5(a)(1)(ii), which deals with the issue of adding necessary classifications and rates omitted from the wage determination which has been made applicable to the project in question. Concern was expressed that the procedures in this subsection would impose collective bargaining, cause delays, create the potential for disruption and disagreement, and slow the construction process.

These changes proposed and finalized in this subsection will not impose collective bargaining. The Department of Labor will continue its long-standing policy of prohibiting the artificial splitting of classifications traditionally recognized in the construction industry and traditionally contained in Department of Labor wage determinations. The inclusion of employees, or their representatives, as interested parties in the process of adding classifications and rates which have been omitted from wage determinations recognizes the facts of economic reality, that workers bring a useful intelligence of the relationship of the work they are performing to that of other classes which helps set proper rate relationships. To deprive them of a right to have input in this process, as was the case in the past, would be to continue an unjustifiable inequity. This was recognized when the policy dealing with the same issue in cases arising under the Service Contract Act was adopted in 1966.

While we have included time limits on responding to agency conformance requests in (B) of this subsection to eliminate any unnecessary delays in processing requests for additional classifications, we agree with the

commenters that the same limits should be followed under (C) of this subsection, concerning resolution of disputes, and the language has been changed accordingly.

Numerous comments were received opposing the addition of provisions in §§ 5.5(a)(2) and 5.5(b)(3) to allow agencies to withhold monies to satisfy DBRA/CWHSSA underpayments on contracts other than those in which the alleged violations occurred (hereafter referred to as "cross-withholding"). Some commenters argued that the statute did not authorize cross-withholding and that the decision in *Whitney Bros. Plumbing and Heating v. United States* (224 F. Supp. 860 (D. Alaska 1963)) specifically prohibited this. Several agencies state that these provisions would in effect remove authority from the contracting agency to withhold funds and redelegate it to the Department of Labor. Other commenters objected that the provisions would be unworkable when more than one agency was involved.

The language of both the DBA and the CWHSSA provide that stipulations (clauses) be included in each contract subject to the Acts to permit the contracting agency to withhold funds from the contract to satisfy unpaid wages due to laborers and mechanics employed on the contract. The clear Congressional intent of such language is to protect the wages of laborers and mechanics who perform work on the contract. In the past, due to the lack of the cross-withholding provisions, many contractors and subcontractors have escaped payment of back wages because violations were not discovered until after final payment on the contract had been made. To allow such practices to continue is contrary to the clear intent of the Acts. The decision in *Whitney Bros. Plumbing and Heating v. United States*, while precluding the withholding from another contract under the regulations as they existed at that time, did not indicate the cross-withholding would be prohibited if the Department adopted regulations to accomplish cross-withholding.

Provisions for cross-withholding have been contained in the Service Contract Act and the Walsh-Healey Public Contracts Act since their inception, and the Department's experience with this authority and its enforcement of such provisions under these Acts has not caused any of the disruptions and administrative delays anticipated by many of the commenters. It should be noted that the General Accounting Office commented in favor of cross-withholding. GAO concluded its

comments on this matter by stating: "We believe that a cross-withholding procedure provided by regulations and contractual provision is not contrary to the DBA and CWHSSA, and indeed is consistent with the remedial purpose of those Acts."

While the Department recognizes that the contracting officer takes the action necessary to accomplish actual withholding of payment of contract funds, it is clear that to require such action be taken on a request by authorized representatives of the Department of Labor is not a usurpation of the contracting agency's authority but rather the exercise of an authority given to the Department by Reorganization Plan No. 14 of 1950 in order to accomplish the enforcement coordination and oversight responsibilities conferred upon it under that Plan, and to permit it to carry out its investigatory responsibilities.

With respect to the contract labor standards provision pertaining to the submission of weekly payrolls set forth in § 5.5(a)(3)(ii), commenters suggested that contractors be required to report the employee's address only in the first week of employment and thereafter only when there was a change in the address. A Federal agency questioned why the social security number was not required since such information would further aid in identifying employees, many of whom may have similar names. Another Federal agency commented that an agency should have the right to delegate its recordkeeping responsibilities to local Government agencies, which are the recipient of Federal funds, with monitoring authority only being retained by the agency. In response to the comments on employee addresses, the instructions for completing the Form WH-347 require only that the address of the employee be reported on the first payroll an employee works on the contract unless the address changes. Many firms do not use this optional form but submit the required information in a manner preferable to them, and therefore are not aware of these instructions. Accordingly, we have added language to this subsection to reflect the Department's policy. The inclusion of employees' social security numbers would assist the Federal agencies, the Department of Labor, and the General Accounting Office in making positive identification of employees and in making tax deductions on back wage payments, and we have added the social security number to the information which is to be reported on the payrolls.

Based on our experience there has been little or no review of certified payroll records by parties other than the Federal agencies, and consequently, we have not adopted the suggestion of delegating this responsibility since we want to insure that these documents so necessary to on-going compliance are fully used for the essential purpose for which they are intended.

Several contractors' associations and construction companies expressed dissatisfaction with the requirement in § 5.5(a)(4) to pay the full amount of the fringe benefits stipulated on the applicable wage decision for journeymen to apprentices and trainees when the apprenticeship or training program is silent regarding the payment of such benefits. There were also objections to the proposed requirement to observe the ratios and wage rates for apprentices and trainees in localities where construction is performed, rather than those ratios applicable in the locality in which the program is registered or approved. A Federal agency recommended that a minor language change be made to make it clear that it is the contractor's or subcontractor's obligation to furnish written evidence of the registration of the apprenticeship program or the certification of the training program without being specifically requested by the contracting officer to do so. Another Federal agency suggested that language similar to that in § 5.5(a)(4)(ii) regarding the withdrawal of approval of training programs by BAT be added to § 5.5(a)(4)(i) referencing apprentices.

It has been the Department's position that if the apprentice or trainee plan is silent on fringe benefits, the apprentices or trainees must receive the full amounts of the fringe benefits stipulated in the applicable wage decision for the classification of work performed. In situations where fringe benefits are listed on the wage determination for a particular craft, apprentices or trainees in that craft normally receive such benefits. In cases where the prevailing apprentice practice indicates they do not receive the full fringe benefits, or no benefits at all, we have made provisions in the regulations to allow for less than the payment of full fringe benefits. To allow a contractor to make its own decisions on the amount of fringe benefits to pay his apprentices and trainees when its approved plan is silent on the issue would give it a distinctly unfair competitive advantage with the cost to be borne by the apprentices and trainees employed by such a contractor. This is clearly against the intent of the law. We have, however, clarified the

language in this subsection for easier comprehension.

We have also made revisions in this subsection to allow contractors to follow the ratios and wage rates stipulated in their approved programs at the "home" locality instead of requiring contractors to observe the ratios and wage rates for apprentices and trainees in the locality where the construction is performed, if it happens to be different from those required by their programs. Upon reconsideration, we decided that to impose different plans on contractors, many of which work in several locations where there could be differing apprenticeship standards, would be adding needless burdens to their business activities.

In addition, we adopted the Federal agencies' suggestions to change the language in § 5.5(a)(4) to make it clear it was the contractor's or subcontractor's obligation to submit written evidence of the program and to add the language in § 5.5(a)(4)(ii) concerning the withdrawal of registration of the program to § 5.5(a)(4)(i).

Several contractor associations objected to the new language of § 5.5(a)(7) which prohibits debarred persons or firms from performing not only as prime contractors but also as subcontractors on projects subject to any of the statutes listed in § 5.1. The change in this subsection is in accordance with the intent of the Acts that debarred contractors not perform any work on Government contracts. This has been a policy followed under the Service Contract Act from its inception. See § 4.188 of 29 CFR Part 4. In addition, this provision is consonant with the Federal Procurement Regulations, the Defense Acquisition Regulations, and other individual agency procurement regulations. Moreover, in its comments on the proposed regulations, the General Accounting Office stated that it had no objection to debarred contractors being ineligible to receive subcontracts from contractors having contracts with the Government.

A number of respondents objected to the portion of § 5.5(a)(9) which states that disputes arising out of the labor standards provisions of the contract are not subject to the general disputes clause of the contract, but to the provisions of Parts 5, 6, and 7 of this Title. Federal agencies commented that the provision conflicts with the authority of the contracting officer as set forth in the Contracts Dispute Act of 1978 (Pub. L. 95-563, 41 U.S.C. Sec. 601 et seq.). Reorganization Plan No. 14 of 1950, as explained in the President's message accompanying the Plan, invests in the

Secretary of Labor the responsibility "to coordinate the administration of laws relating to wages and hours on Federally-financed or assisted projects by prescribing standards, regulations, and procedures to govern the enforcement activities of the various Federal agencies * * *". With respect to the Contract Disputes Act of 1978, section 14 of that statute sets forth the specific amendments to existing statutes. Significantly, no change, repeal, amendment, or other reference was made to the Davis-Bacon and Related Acts, the Contract Work Hours and Safety Standards Act, the Copeland Act, or Reorganization Plan No. 14 of 1950. Therefore, in our view, the Department's authority to resolve disputes under these statutes and Reorganization Plan No. 14 is not impinged by section 14 of the Contract Disputes Act. Also, section 6(a) of the Contract Disputes Act states, in part, that "the authority of this subsection shall not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation which another Federal agency is specifically authorized to administer, settle, or determine".

Furthermore, logic would dictate that the authority to resolve labor disputes should reside in the agency which has the primary responsibility for protecting worker labor standards and the prerequisite expertise in administering the law and the regulations necessary to insure the effective and consistent enforcement of such labor standards provisions. Agencies should note that the General Accounting Office stated that it had no objection to the adoption of this provision.

Concern was expressed, particularly by contractor associations, about the possible interpretation of the term "interest" found in § 5.5(a)(10)(i) dealing with the debarment of contractors. The phrase "any person or firm who has an interest in the contractor's firm", is derived from the statutory language of the Davis-Bacon Act. The Department looks to each situation on a case by case basis and we will consider all the circumstances, including such factors as the question of a person's involvement with the firm's daily operations and policy decisions and the person's ownership interest in the firm.

As suggested by a Federal agency, we have amended § 5.5(c), which deals with the labor standards clauses which are to be inserted in contracts subject to the CWHSSA, to set forth in full the recordkeeping requirements.

Enforcement (Section 5.6)

Several Federal agencies commented that some of the enforcement

responsibilities set forth in § 5.6, such as the preservation of payrolls and the filing of certifications of compliance, should be delegated to grantees. Other contracting agencies recommended that the Department furnish agencies a copy of the entire investigation file, including the interview statements to enable the agencies to make a more intelligent decision on the assessment of liquidated damages. Concern was expressed about the requirement that no payments be made to the contractor until the agency insures that the contract contains the applicable labor standards clauses and wage determination since disputes occasionally arise and the Department would be given unwarranted control over the disbursement of agency funds.

It is clear from the definition of "Federal agency" in § 5.2(c) that this term does not include local Government grantees or recipients of Federal assistance. The Davis-Bacon enforcement responsibility lies solely with the Federal agencies and the Department of Labor and cannot be abdicated to local Governments who are the recipients of the Federal funds. We believe that this policy is mandated by the terms of Reorganization Plan No. 14 of 1950, and is necessary in order to maintain effective and efficient control over Federal construction monies and construction standards and the Davis-Bacon enforcement program. In reporting the results of its investigations to contracting agencies, the Department routinely furnishes all of the information which is necessary for an agency to complete its actions. Experience has shown that copies of employee interview statements, which are obtained under a pledge of confidentiality, have sometimes been provided to the contractors who have instituted reprisals against the affected employees. Nevertheless, if a contracting agency feels it is necessary in a particular case, we do, and will continue to, provide summaries of the information contained in the statements. Contrary to the understanding of some commenters, on § 5.6(a)(1), the Federal agency may approve the payment of funds when there is a dispute provided that there is a certification on file that there is a substantial dispute with respect to the required provisions. Of course, withholding must be effectuated before final payment is made.

Suspension of Funds (Section 5.9)

Several contracting agencies questioned the Department's authority to request the contracting agencies to withhold funds as provided in § 5.9. The authority delegated to the Secretary of

Labor under Reorganization Plan No. 14 of 1950, contemplates that the Department of Labor, which is responsible for a coordinated Government-wide enforcement program, should have the concomitant authority to request the withholding of funds with the full expectation of having such requests honored by the agency. Without this authority to protect funds from which workers will be paid wages owed them, the Department's authority under the Plan to conduct investigations would be meaningless.

Department of Labor Hearings (Section 5.11)

In its comments on Part 6, containing enforcement procedures, the ABC, commented on the "loophole" it perceived in proposed section 5.11 pursuant to which the granting of evidentiary hearings on enforcement matters other than debarment was subject to the Administrator's discretion when the dispute involved significant sums of money, large groups of employees, or novel or unusual situations. ABC argued that this "loophole" constituted a denial of due process to contractors. Although hearings have commonly been afforded under the existing regulation, this regulation has been revised to provide hearings on disputes whenever there is a relevant issue of fact. However, in many instances a hearing is not necessary because there is no relevant issue of fact. Accordingly, in such a case the regulation provides that a ruling will be issued by the Administrator, and the contractor afforded an opportunity to seek review by the Wage Appeals Board.

As suggested by one of the respondents, we have increased the time in which a contractor may request a hearing from twenty days to thirty days from the date of the Administrator's letter.

Debarment Proceedings (Section 5.12)

There were several comments questioning why there are different periods of debarment under the Davis-Bacon Act and the Davis-Bacon and Related Acts, and different provisions for removal from the ineligible list under the Davis-Bacon and the Related Acts. It was also suggested that the Department provide for varied periods of debarment under the Davis-Bacon and the Related Acts.

Section 3(a) of the Davis-Bacon Act mandates a three-year period of debarment and there is no provision in the statute for removal from the ineligible bidders list prior to the

expiration of the three years. Debarment under the Davis-Bacon and Related Acts is not mandated by these various statutes, but is provided for by regulations. In consonance with the ruling by the U.S. Court of Appeals for the District of Columbia in *Copper Plumbing and Heating Co. v. Campbell* (290 F.2d 368 [C.A.D.C. 1961]) we have provided by regulation for removal from the ineligible list of the contractors debarred under the Related Acts who can demonstrate a current responsibility to comply with labor standards requirements. Since these regulations provide procedures for removal from the ineligible list after six months, we are, in effect, allowing varying periods of debarment as suggested by some of the commenters.

There was also a suggestion to provide for an interim debarment mechanism during the pendency of administrative proceedings similar to the mechanisms currently utilized by other agencies. While no changes are being made in the regulations at this time, we are considering the development of interim debarment procedures.

As in § 5.11, we are changing the 20 day time limit in which to respond to the letter notifying the party of potential debarment to 30 days.

A new subsection (d) has been added to provide a procedure for determination of a debarred contractor's interest in another firm. This subsection provides for administrative law judge hearings where there is a relevant question of fact, or appeal to the Wage Appeals Board where relevant facts are not in dispute. This provision dovetails with the hearing procedure in 29 CFR Part 6, Subpart D, and corresponds with proposed 29 CFR 4.12. This change is procedural in nature and was omitted as an oversight.

In addition to the above, there were other comments recommending minor editorial and language changes which we deemed valid, and we have amended the affected sections.

This rule was drafted under the supervision and direction of Donald Elisburg, Assistant Secretary of Labor, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, D.C. 20210 (202-523-6191).

Accordingly, 29 CFR Part 5 is revised as set forth below.

Signed at Washington, D.C., this 12th day of January, 1981.

Donald Elisburg,

Assistant Secretary of Labor, Employment Standards Administration.

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION (ALSO LABOR STANDARDS PROVISIONS APPLICABLE TO NONCONSTRUCTION CONTRACTS SUBJECT TO THE CONTRACT WORK HOURS AND SAFETY STANDARDS ACT)

Subpart A—Davis-Bacon and Related Acts Provisions and Procedures

Sec.

- 5.1 Purpose and scope.
- 5.2 Definitions.
- 5.3 [Reserved].
- 5.4 [Reserved].
- 5.5 Contract provisions and related matters.
- 5.6 Enforcement.
- 5.7 Reports to the Secretary of Labor.
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- 5.10 Restitution, criminal action.
- 5.11 Department of Labor hearings.
- 5.12 Debarment proceedings.
- 5.13 Rulings and interpretations.
- 5.14 Variations, tolerances, and exemptions from Parts 1 and 3 of this subtitle and this part.
- 5.15 Limitations, variations, tolerances, and exemptions under the Contract Work Hours and Safety Standards Act.
- 5.16 Training plans approved or recognized by the Department of Labor prior to August 20, 1975.
- 5.17 Withdrawal of approval of a training program.
- 5.18 Appeal from Bureau of Apprenticeship and Training's decision.

Authority: 40 U.S.C. 276a-276a-7; 40 U.S.C. 276c; 40 U.S.C. 327-332; Reorganization Plan No. 14 of 1950, 5 U.S.C. Appendix; 5 U.S.C. 301; and the statutes listed in section 5.1(a) of this part.

§ 5.1 Purpose and scope.

(a) The regulations contained in this part are promulgated under the authority conferred upon the Secretary of Labor by Reorganization Plan No. 14 of 1950 and the Copeland Act in order to coordinate the administration and enforcement of the labor standards provisions of each of the following acts by the Federal agencies responsible for their administration and of such additional statutes as may from time to time confer upon the Secretary of Labor additional duties and responsibilities similar to those conferred upon the Secretary of Labor under Reorganization Plan No. 14 of 1950:

1. The Davis-Bacon Act (sec. 1-7, 46 Stat. 1949, as amended; Pub. L. 74-403, 40 U.S.C. 276a-276a-7).
2. Copeland Act (40 U.S.C. 276c).
3. The Contract Work Hours and Safety Standards Act (40 U.S.C. 327-332).
4. National Housing Act (sec. 212 added to c. 847, 48 Stat. 1246, by sec. 14, 53 Stat. 807; 12 U.S.C. 1715c and repeatedly amended).
5. Housing Act of 1950 (college housing) (amended by Housing Act of 1959 to add labor provisions, 73 Stat. 661; 12 U.S.C. 1749a(f)).
6. Housing Act of 1959 (sec. 401(f) of the Housing Act of 1950 as amended by Pub. L. 86-372, 73 Stat. 681; 12 U.S.C. 1701q(c)(3)).
7. Commercial Fisheries Research and Development Act of 1964 (sec. 7, 78 Stat. 199; 16 U.S.C. 779e(b)).
8. Library Services and Construction Act (sec. 7(a), 78 Stat. 13; 20 U.S.C. 355c(a)(4), as amended).
9. National Technical Institute for the Deaf Act (sec. 5(b)(5), 79 Stat. 128; 20 U.S.C. 664(b)(5)).
10. National Foundation on the Arts and Humanities Act of 1965 (sec. 5(k), 79 Stat. 646 as amended; 20 U.S.C. 954(j)).
11. Elementary and Secondary Education Act of 1965 as amended by Elementary and Secondary and other Education Amendments of 1969 (sec. 423 as added by Pub. L. 91-230, title IV, sec. 401(a)(10), 84 Stat. 169, and renumbered sec. 433, by Pub. L. 92-318; title III, sec. 301(e)(1), 86 Stat. 326; 20 U.S.C. 1232(b)). Under the amendment coverage is extended to all programs administered by the Commissioner of Education.
12. The Federal-Aid Highway Act of 1956 (sec. 108(b), 70 Stat. 378, recodified at 72 Stat. 895; 23 U.S.C. 113, as amended), see particularly the amendments in the Federal-Aid Highway Act of 1968 (Pub. L. 90-495, 82 Stat. 615).
13. Indian Self-Determination and Education Assistance Act (sec. 7, 88 Stat. 2205; 25 U.S.C. 450e).
14. Indian Health Care Improvement Act (sec. 303(b), 90 Stat. 1407; 25 U.S.C. 1633(b)).
15. Rehabilitation Act of 1973 (sec. 306(b)(5) 87 Stat. 384, 29 U.S.C. 776(b)(5)).
16. Comprehensive Employment and Training Act of 1973 (sec. 606, 87 Stat. 880, renumbered sec. 706 by 88 Stat. 1845; 29 U.S.C. 986; also sec. 604, 88 Stat. 1846; 29 U.S.C. 984(b)(3)).
17. State and Local Fiscal Assistance Act of 1972 (sec. 123(a)(6), 86 Stat. 933; 31 U.S.C. 1246(a)(6)).
18. Federal Water Pollution Control Act (sec. 513 of sec. 2, 86 Stat. 894; 33 U.S.C. 1372).
19. Veterans Nursing Home Care Act of 1964 (78 Stat. 502, as amended; 38 U.S.C. 5035(a)(9)).
20. Postal Reorganization Act (sec. 410(b)(4)(C); 84 Stat. 726 as amended; 39 U.S.C. 410(b)(4)(C)).
21. National Visitors Center Facilities Act of 1966 (sec. 110, 32 Stat. 45; 40 U.S.C. 808).
22. Appalachian Regional Development Act of 1965 (sec. 402, 79 Stat. 21; 40 U.S.C. App. 402).
23. Health Services Research, Health Statistics, and Medical Libraries Act of 1974 (sec. 107, see sec. 308(h)(2) thereof, 88 Stat. 370, as amended by 90 Stat. 378; 42 U.S.C. 242m(h)(2)).
24. Hospital Survey and Construction Act, as amended by the Hospital and Medical Facilities Amendments of 1964 (sec. 605(a)(5), 78 Stat. 453; 42 U.S.C. 291e(a)(5)).
25. Health Professions Educational Assistance Act (sec. 303(b), 90 Stat. 2254; 42 U.S.C. 293a(g)(1)(C); also sec. 308a, 90 Stat. 2258, 42 U.S.C. 293a(c)(7)).
26. Nurse Training Act of 1964 (sec. 941(a)(1)(C), 89 Stat. 384; 42 U.S.C. 296a(b)(5)).
27. Heart Disease, Cancer, and Stroke Amendments of 1965 (sec. 904, as added by sec. 2, 79 Stat. 828; 42 U.S.C. 299d(b)(4)).
28. Safe Drinking Water Act (sec. 2(a) see sec. 1450e thereof, 88 Stat. 1691; 42 U.S.C. 300j-9(e)).
29. National Health Planning and Resources Act (sec. 4, see sec. 1604(b)(1)(H), 88 Stat. 2261, 42 U.S.C. 3000-3(b)(1)(H)).
30. U.S. Housing Act of 1937, as amended and recodified (88 Stat. 667; 42 U.S.C. 1437j).
31. Demonstration Cities and Metropolitan Development Act of 1966 (secs. 110, 311, 503, 1003, 80 Stat. 1259, 1270, 1277, 1284; 42 U.S.C. 3310; 12 U.S.C. 1715c; 42 U.S.C. 1437j).
32. Slum clearance program: Housing Act of 1949 (sec. 109, 63 Stat. 419, as amended; 42 U.S.C. 1459).
33. Farm housing: Housing Act of 1964 (adds sec. 516(f) to Housing Act of 1949 by sec. 503, 78 Stat. 797; 42 U.S.C. 1486(f)).
34. Housing Act of 1961 (sec. 707, added by sec. 907, 79 Stat. 496, as amended; 42 U.S.C. 1500c-3).
35. Defense Housing and Community Facilities and Services Act of 1951 (sec. 310, 65 Stat. 307; 42 U.S.C. 1592i).
36. Special Health Revenue Sharing Act of 1975 (sec. 303, see sec. 222(a)(5) thereof, 89 Stat. 324; 42 U.S.C. 2689(a)(5)).
37. Economic Opportunity Act of 1964 (sec. 607, 78 Stat. 532; 42 U.S.C. 2947).
38. Headstart, Economic Opportunity, and Community Partnership Act of 1974 (sec. 11, see sec. 811 thereof, 88 Stat. 2327; 42 U.S.C. 2992a).
39. Housing and Urban Development Act of 1965 (sec. 707, 79 Stat. 492 as amended; 42 U.S.C. 3107).
40. Older Americans Act of 1965 (sec. 502, Pub. L. 89-73, as amended by sec. 501, Pub. L. 93-29; 87 Stat. 50; 42 U.S.C. 3041a(a)(4)).
41. Public Works and Economic Development Act of 1965 (sec. 712; 79 Stat. 575 as amended; 42 U.S.C. 3222).
42. Juvenile Delinquency Prevention Act (sec. 1, 86 Stat. 536; 42 U.S.C. 3884).
43. New Communities Act of 1968 (sec. 410, 82 Stat. 516; 42 U.S.C. 3909).
44. Urban Growth and New Community Development Act of 1970 (sec. 727(f), 84 Stat. 1803; 42 U.S.C. 4529).
45. Domestic Volunteer Service Act of 1973 (sec. 406, 87 Stat. 410; 42 U.S.C. 5046).
46. Housing and Community Development Act of 1974 (secs. 110, 802(g), 88 Stat. 649, 724; 42 U.S.C. 5310, 1440(g)).
47. Developmentally Disabled Assistance and Bill of Rights Act (sec. 126(4), 89 Stat. 488; 42 U.S.C. 6042(4); title I, sec. 111, 89 Stat. 491; 42 U.S.C. 6063(b)(19)).
48. National Energy Conservation Policy Act (sec. 312, 92 Stat. 3254; 42 U.S.C. 6371j).
49. Public Works Employment Act of 1976 (sec. 109, 90 Stat. 1001; 42 U.S.C. 6708; also sec. 208, 90 Stat. 1008; 42 U.S.C. 6728).

50. Energy Conservation and Production Act (sec. 451(h), 90 Stat. 1168; 42 U.S.C. 6881(h)).

51. Solid Waste Disposal Act (sec. 2, 90 Stat. 2823; 42 U.S.C. 6979).

52. Rail Passenger Service Act of 1970 (sec. 405d, 84 Stat. 1337; 45 U.S.C. 565(d)).

53. Urban Mass Transportation Act of 1964 (sec. 10, 78 Stat. 307; renumbered sec. 13 by 88 Stat. 715; 49 U.S.C. 1609).

54. Highway Speed Ground Transportation Study (sec. 6(b), 79 Stat. 893; 49 U.S.C. 1636(b)).

55. Airport and Airway Development Act of 1970 (sec. 22(b), 84 Stat. 231; 49 U.S.C. 1722(b)).

56. Federal Civil Defense Act of 1950 (50 U.S.C. App. 2281).

57. National Capital Transportation Act of 1965 (sec. 3(b)(4), 79 Stat. 644; 40 U.S.C. 682(b)(4). Note.—Repealed December 9, 1969, and labor standards incorporated in sec. 1-1431 of the District of Columbia Code).

58. Model Secondary School for the Deaf Act (sec. 4, 80 Stat. 1027, Pub. L. 89-694, but not in the United States Code).

59. Delaware River Basin Compact (sec. 15.1, 75 Stat. 714, Pub. L. 87-328) (considered a statute for purposes of the plan but not in the United States Code).

60. Energy Security Act (sec. 175(c), Pub. L. 96-294, 94 Stat. 611; 42 U.S.C. 8701 note).

(b) Part 1 of this subtitle contains the Department's procedural rules governing requests for wage determinations and the issuance and use of such wage determinations under the Davis-Bacon Act and its related statutes as listed in that part.

§ 5.2 Definitions.

(a) The term "Secretary" includes the Secretary of Labor, the Assistant Secretary of Labor for Employment Standards, and their authorized representatives.

(b) The term "Administrator" means the Administrator of the Wage and Hour Division or the authorized representative as set forth in this part. In the absence of the Wage-Hour Administrator, the Deputy Administrator of the Wage and Hour Division, is designated to act for the Administrator under this Part. Except as otherwise provided in this Part, the Assistant Administrator for Government Contract Wage Standards is the authorized representative of the Administrator in the administration of the statutes listed in § 5.1.

(c) The term "Federal agency" means the agency or instrumentality of the United States which enters into the contract or provides assistance through loan, grant, loan guarantee or insurance, or otherwise, to the project subject to a statute listed in § 5.1.

(d) The term "Agency Head" means the principal official of the Federal agency and includes those persons duly

authorized to act in the behalf of the Agency Head.

(e) The term "Contracting Officer" means the individual, a duly appointed successor, or authorized representative who is designated and authorized to enter into contracts on behalf of the Federal agency.

(f) The term "labor standards" as used in this part means the requirements of the Davis-Bacon Act, the Contract Work Hours and Safety Standards Act (other than those relating to safety and health), the Copeland Act, and the prevailing wage provisions of the other statutes listed in § 5.1, and the regulations in Parts 1 and 3 of this subtitle and this part.

(g) The term "United States or the District of Columbia" means the United States, the District of Columbia, and all executive departments, independent establishments, administrative agencies, and instrumentalities of the United States and of the District of Columbia, including corporations, all or substantially all of the stock of which is beneficially owned by the United States, by the foregoing departments, establishments, agencies, instrumentalities, and including non-appropriated fund instrumentalities.

(h) The term "contract" means any contract in excess of \$2,000 which is subject wholly or in part to the labor standards provisions of any of the acts listed in § 5.1 and any subcontract of any tier thereunder, let under the prime contract, which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution, except where a different meaning is expressly indicated. A State or local Government is not regarded as a contractor under statutes providing loans, grants, or other Federal assistance in situations where construction is performed by its own employees. However, under certain enabling statutes, State and local recipients of Federal-aid must pay these employees according to Davis-Bacon labor standards.

(i) The terms "building" or "work" generally include construction activity as distinguished from manufacturing, furnishing of materials, or servicing and maintenance work. The terms include without limitation, buildings, structures, and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels,

sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. The manufacture or furnishing of materials, articles, supplies or equipment (whether or not a Federal or State agency acquires title to such materials, articles, supplies, or equipment during the course of the manufacture or furnishing, or owns the materials from which they are manufactured or furnished) is not a "building" or "work" within the meaning of the regulations in this part unless conducted in connection with and at the site of such a building or work as is described in the foregoing sentence, or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project.

(j) The terms "construction", "prosecution", "completion", or "repair" mean all types of work done on a particular building or work at the site thereof or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project, including without limitation, altering, remodeling, installation (where appropriate) on-site of items fabricated off-site, painting and decorating, the transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor, and the manufacturing or furnishing of materials, articles, supplies or equipment on the site of the building or work (or under the United States Housing Act of 1937 and the Housing Act of 1949 in the construction or development of the project), by persons employed by the contractor or subcontractor. However, the term "initial construction" in section 113 of Title 23, U.S.C., which pertains to Federal-aid highway work, does not include repair or maintenance work.

(k) The term "public building" or "public work" includes building or work, the construction, prosecution, completion, or repair of which, as defined above, is carried on directly by authority of or with funds of a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

(l) The term "site of the work" is defined as follows:

(1) The "site of the work" is limited to the physical place or places where the construction called for in the contract will remain when work on it has been

completed and to other adjacent or nearby property used by the contractor or subcontractor in such construction which can reasonably be said to be included in the "site" because of its proximity.

(2) Fabrication Plants, "mobile factories," batch plants, borrow pits, job headquarters, tool yards, etc., are part of the "site of the work" provided they are dedicated exclusively, or nearly so, to performance of the contract and are so located in proximity to the actual construction location that it would be reasonable to include them.

(3) Not included in the "site of the work" are permanent home offices or branch plant establishments of a contractor or subcontractor, its fabrication plant and tool yard establishments, whose locations and continuance are governed by its general business operations.

(m) The term "laborer" or "mechanic" includes at least those workers whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental or managerial. The term "laborer" or "mechanic" includes apprentices and trainees, and, in the case of contracts subject to the Contract Work Hours and Safety Standards Act, watchmen or guards. The term does not apply to workers whose duties are primarily administrative, executive, or clerical, rather than manual. Persons employed in a bona fide executive, administrative, or professional capacity as defined in Part 541 of this title are not deemed to be laborers or mechanics. Working foremen who devote more than 20 percent of their time during a workweek to mechanic or laborer duties, and who do not meet the criteria of Part 541, are laborers and mechanics for the time so spent.

(n) The terms apprentice and trainee are defined as follows:

(1) "Apprentice" means (i) a person employed and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or (ii) a person in the first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice;

(2) "Trainee" means a person registered and receiving on-the-job training in a construction occupation under a program which has been approved in advance by the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training as meeting its standards for on-the-job training programs and which has been so certified by that Bureau.

(3) These provisions do not apply to "apprentices" and "trainees" employed on projects subject to 23 U.S.C. 113 who are enrolled in programs which have been certified by the Secretary of Transportation in accordance with 23 U.S.C. 113(c).

(o) Every person performing the duties of a laborer or mechanic in the construction, prosecution, completion, or repair of a public building or public work, or building or work financed in whole or in part by loans, grants, or guarantees from the United States is "employed" regardless of any contractual relationship alleged to exist between the contractor or such person.

(p) The term "wages" means the basic hourly rate of pay; any contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a bona fide fringe benefit fund, plan, or program; and the rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing bona fide fringe benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program, which was communicated in writing to the laborers and mechanics affected. The fringe benefits enumerated in the Davis-Bacon Act include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing; unemployment benefits; life insurance, disability insurance, sickness insurance, or accident insurance; vacation or holiday pay; defraying costs of apprenticeship or other similar programs; or other bona fide fringe benefits. Fringe benefits do not include benefits required by other Federal, State, or local law.

(q) The term "wage determination" includes the original decision and any subsequent decisions modifying, superseding, correcting, or otherwise changing the provisions of the original decision. The application of the wage determination shall be in accordance with the provisions of § 1.6 of this title.

§§ 5.3-5.4 [Reserved]

§ 5.5 Contract provisions and related matters.

(a) The Agency head shall cause or require the contracting officer to insert in full in any contract subject to the labor standards provisions of any of the acts listed in § 5.1, except those subject only to the Contract Work Hours and Safety Standards Act, the following clauses (or any modifications thereof to meet the particular needs of the agency: *Provided*, That such modifications are first approved by the Department of Labor):

(1) *Minimum wages.* (i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to the skill, except as provided in § 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: *Provided*, That the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage

determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii)(A) The contracting officer shall require that any class of laborers or mechanics which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The contracting officer shall approve an additional classification and wage rate and fringe benefits therefor only when the following criteria have been met:

(1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is generally recognized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, agree with the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent by the contracting officer to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210. The Administrator, or an authorized representative, will respond within 30 days of receipt thereof and will approve, reverse, or modify every additional classification action.

(C) In the event the contractor, or the laborers or mechanics to be employed in the classification or their representatives, do not agree with the contracting officer on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the contracting officer shall refer the questions, including the views of all interested parties and the recommendation of the contracting officer, to the Administrator for determination. The Administrator, or an authorized representative, will issue a determination within 30 days of receipt unless notice is otherwise furnished to the contracting agency within the 30 day period.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to subparagraphs (1)(B) or (C) of this paragraph, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program. *Provided*, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) *Withholding*. The (write in name of Federal Agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other Federal contract, or any other Federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices and trainees, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice or trainee, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, the (Agency) may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) *Payrolls and basic records*. (i) Payrolls and basic records relating thereto shall be maintained by the

contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits.

(ii) The contractor shall submit weekly a copy of all payrolls to the (write in name of appropriate Federal agency) if the agency is a party to the contract, but if the agency is not such a party the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be for transmission to the (write in name of agency). The payrolls shall set out accurately and completely the name and address (on the first payroll on which the employee's name appears and on subsequent payrolls if the employee's address changes) and social security number of each laborer or mechanic, his or her correct classification, rate of pay, daily and weekly number of hours worked, deductions made, and actual wages paid. This information may be submitted in any form desired. Optional Form WH-347 is available for this purpose and may be purchased from the Superintendent of Documents (Federal Stock Number 029-005-00014-1), U.S. Government Printing Office, Washington, D.C. 20402. Each payroll shall be accompanied by a "Statement of Compliance" as set forth on the reverse side of Optional Form WH-347 or on any form with identical wording, signed by the employer or his or her agent indicating that the payrolls are

correct and complete, that the wage rates and fringe benefits or cash equivalents shown therein are not less than those determined by the Secretary of Labor and that the classifications set forth for each laborer or mechanic conform with the work performed. The prime contractor shall be responsible for the submission of copies of payrolls of all subcontractors. The contractor or subcontractor will make the records required under the labor standards clauses of the contract available for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and will permit such representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to make the required records available, the Federal agency may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Contractors employing apprentices or trainees under approved programs shall include a notation on the first weekly certified payrolls submitted to the contracting agencies that they are registered in an approved program and shall identify the program.

(4) *Apprentices and trainees—(i) Apprentices.* Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training, or with a State Apprenticeship Agency recognized by the Bureau, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Bureau of Apprenticeship and Training or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not a trainee as defined in subdivision (ii) of this subparagraph or is not registered or otherwise employed as stated above,

shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. The contractor or subcontractor shall furnish to the contracting officer written evidence of the registration of the program, the registration of the apprentices, and the ratios and wage rates prescribed in the applicable program, prior to using any apprentices on the contract work. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Bureau of Apprenticeship and Training, or a State Apprenticeship Agency recognized by the Bureau, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(ii) *Trainees.* Except as provided in 29 CFR 5.16 trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Bureau of Apprenticeship and Training. Every

trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the Administrator of the Wage and Hour Division determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Bureau of Apprenticeship and Training shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. The contractor or subcontractor shall furnish the contracting officer written evidence of the certification of the program, the registration of the trainees, and the ratios and wage rates (expressed in percentages of the journeyman hourly rate) prescribed in that program prior to using any trainees on the contract work. In the event the Bureau of Apprenticeship and Training withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) *Equal employment opportunity.* The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR Part 30.

(5) *Compliance with Copeland Act requirements.* The contractor shall comply with the requirements of 29 CFR Part 3, which are incorporated by reference in this contract.

(6) *Subcontracts.* The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the (write in the name of the Federal agency) may by appropriate

instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.

(7) *Contract termination: debarment.* A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.

(8) *Compliance with Davis-Bacon and Related Act requirements.* All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR Parts 1, 3, and 5 are herein incorporated by reference in this contract.

(9) *Disputes concerning labor standards.* Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR Parts 5, 8, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and the contracting agency, the U.S. Department of Labor, or the employees or their representatives.

(10) *Certification of Eligibility.* (i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).

(iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(b) *Contract Work Hours and Safety Standards Act.* The Agency Head shall cause or require the contracting officer to insert the following clauses set forth in paragraphs (b)(1), (2), (3), and (4) of this section in full in any contract subject to the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by § 5.5(a) or § 4.6 of Part 4 of this title. As used in this paragraph, the terms "laborers" and "mechanics" include watchmen and guards.

(1) *Overtime requirements.* No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment

of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of eight hours in any calendar day or in excess of forty hours in such workweek, whichever is greater.

(2) *Violation; liability for unpaid wages; liquidated damages.* In the event of any violation of the clause set forth in subparagraph (1) of this paragraph, the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in subparagraph (1) of this paragraph, in the sum of \$10 for each calendar day on which such individual was required or permitted to work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in subparagraph (1) of this paragraph.

(3) *Withholding for unpaid wages and liquidated damages.* The (write in the name of the Federal agency or the loan or grant recipient) shall upon its own action or upon written request of an authorized representative of the Department of Labor withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract, or any other Federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in subparagraph (2) of this paragraph.

(4) *Subcontracts.* The contractor or subcontractor shall insert in any subcontracts the clauses set forth in subparagraphs (1) through (4) of this paragraph and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be

responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in subparagraphs (1) through (4) of this paragraph.

(c) In addition to the clauses contained in paragraph (b), in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in § 5.1, the Agency Head shall cause or require the contracting officer to insert a clause requiring that the contractor or subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the Agency Head shall cause or require the contracting officer to insert in any such contract a clause providing that the records to be maintained under this paragraph shall be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the (write the name of agency) and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview employees during working hours on the job.

§ 5.6 Enforcement.

(a)(1) It shall be the responsibility of the Federal agency to ascertain whether the clauses required by § 5.5 have been inserted in the contracts subject to the labor standards provisions of the Acts contained in § 5.1. Agencies which do not directly enter into such contracts shall promulgate the necessary regulations or procedures to require the recipient of the Federal assistance to insert in its contracts the provisions of § 5.5. No payment, advance, grant, loan, or guarantee of funds shall be approved by the Federal agency unless the agency insures that the clauses required by § 5.5 and the appropriate wage determination of the Secretary of Labor are contained in such contracts. Furthermore, no payment, advance, grant, loan, or guarantee of funds shall be approved by the Federal agency after the beginning of construction unless there is on file with the agency a certification by the contractor that the contractor and its subcontractors have complied with the provisions of § 5.5 or unless there is on file with the agency a certification by

the contractor that there is a substantial dispute with respect to the required provisions.

(2) The Federal agency shall make such examination of the submitted payrolls and statements of compliance as may be necessary to assure compliance with the labor standards clauses required by § 5.5 and the applicable statutes listed in § 5.1. In connection with such examination particular attention should be given to the correctness of classifications and disproportionate employment of laborers, of helpers where they are listed on the wage determination, and of apprentices or trainees registered in approved programs. Such payrolls and statements shall be preserved by the agency for a period of 3 years from the date of completion of the contract and shall be produced at the request of the Department of Labor at any time during the 3-year period.

(3) In addition to the examination of payrolls and statements required by paragraph (a)(2) of this section, the Federal agency shall cause such investigations to be made as may be necessary to assure compliance with the labor standards clauses required by § 5.5 and the applicable statutes listed in § 5.1. Investigations shall be made of all contracts with such frequency as may be necessary to assure compliance. Such investigations shall include interviews with employees, which shall be taken in confidence, and examinations of payroll data and evidence of registration and certification with respect to apprenticeship and training plans to determine the correctness of classifications and disproportionate employment of laborers, of helpers where they are listed on the wage determination, and of apprentices or trainees registered in approved programs. Such investigations shall also include evidence of fringe benefit plans and payments thereunder. Complaints of alleged violations shall be given priority.

(4) In accordance with normal operating procedures, the contracting agency may be furnished various investigatory material from the investigation files of the Department of Labor. None of the material, other than computations of back wages and liquidated damages and the summary of back wages due, may be disclosed in any manner to anyone other than Federal officials charged with administering the contract or program providing Federal assistance to the contractor, without requesting the permission and views of the Department of Labor.

(5) It is the policy of the Department of Labor to protect the identity of its confidential sources and to prevent an unwarranted invasion of personal privacy. Accordingly, the identity of an employee who makes a written or oral statement as a complaint or in the course of an investigation, as well as portions of the statement which would reveal the employee's identity, shall not be disclosed in any manner to anyone other than Federal officials without the prior consent of the employee. Disclosure of employee statements shall be governed by the provisions of the "Freedom of Information Act" (5 U.S.C. 552, see 29 CFR Part 70) and the "Privacy Act of 1974" (5 U.S.C. 552a).

(b) The Administrator shall cause to be made such investigations as deemed necessary, in order to obtain compliance with the labor standards provisions of the applicable statutes listed in § 5.1, or to affirm or reject the recommendations by the Agency Head with respect to labor standards matters arising under the statutes listed in § 5.1. Federal agencies, contractors, subcontractors, sponsors, applicants, or owners shall cooperate with any authorized representative of the Department of Labor in the inspection of records, in interviews with workers, and in all other aspects of the investigations. The findings of such an investigation, including amounts found due, may not be altered or reduced without the approval of the Department of Labor. Where the underpayments disclosed by such an investigation total \$1,000 or more, where there is reason to believe that the violations are aggravated or willful (or, in the case of the Davis-Bacon Act, that the contractor has disregarded its obligations to employees and subcontractors), or where liquidated damages may be assessed under the Contract Work Hours and Safety Standards Act, the Department of Labor will furnish the Federal agency an enforcement report detailing the labor standards violations disclosed by the investigation and any action taken by the contractor to correct the violative practices, including any payment of back wages. In other circumstances, the Federal agency will be furnished a letter of notification summarizing the findings of the investigation.

§ 5.7 Reports to the Secretary of Labor.

(a) *Enforcement reports.* (1) Where underpayments by a contractor or subcontractor total less than \$1,000, and where there is no reason to believe that the violations are aggravated or willful (or, in the case of the Davis-Bacon Act, that the contractor has disregarded its obligations to employees and

subcontractors), and where restitution has been effected and future compliance assured, the Federal agency need not submit its investigative findings and recommendations to the Administrator, unless the investigation was made at the request of the Department of Labor. In the latter case, the Federal agency shall submit a factual summary report detailing any violations including any data on the amount of restitution paid, the number of workers who received restitution, liquidated damages assessed under the Contract Work Hours and Safety Standards Act, corrective measures taken (such as "letters of notice"), and any information that may be necessary to review any recommendations for an appropriate adjustment in liquidated damages under § 5.8.

(2) Where underpayments by a contractor or subcontractor total \$1,000 or more, or where there is reason to believe that the violations are aggravated or willful (or, in the case of the Davis-Bacon Act, that the contractor has disregarded its obligations to employees and subcontractors), the Federal agency shall furnish within 60 days after completion of its investigation, a detailed enforcement report to the Administrator.

(b) *Semi-annual enforcement reports.* To assist the Secretary in fulfilling the responsibilities under Reorganization Plan No. 14 of 1950, Federal agencies shall furnish to the Administrator by April 30 and October 31 of each calendar year semi-annual reports on compliance with and enforcement of the labor standards provisions of the Davis-Bacon Act and its related acts covering the periods of October 1 through March 31 and April 1 through September 30, respectively. Such reports shall be prepared in the manner prescribed in memoranda issued to Federal agencies by the Administrator.

(c) *Additional information.* Upon request, the Agency Head shall transmit to the Administrator such information available to the Agency with respect to contractors and subcontractors, their contracts, and the nature of the contract work as the Administrator may find necessary for the performance of his or her duties with respect to the labor standards provisions referred to in this part.

(d) *Contract termination.* Where a contract is terminated by reason of violations of the labor standards provisions of the statutes listed in § 5.1, a report shall be submitted promptly to the Administrator and to the Comptroller General (if the contract is subject to the Davis-Bacon Act) giving the name and address of the contractor

or subcontractor whose right to proceed has been terminated, and the name and address of the contractor or subcontractor, if any, who is to complete the work, the amount and number of the contract, and the description of the work to be performed.

§ 5.8 Liquidated damages under the Contract Work Hours and Safety Standards Act.

(a) The Contract Work Hours and Safety Standards Act requires that laborers or mechanics shall be paid wages at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of eight hours in any calendar day or forty hours in any work week. In the event of violation of this provision, the contractor and any subcontractor shall be liable for the unpaid wages and in addition for liquidated damages, computed with respect to each laborer or mechanic employed in violation of the Act, of \$10, for each calendar day or workweek in which such individual was required or permitted to work without payment of required overtime wages. Any contractor or subcontractor aggrieved by the withholding of liquidated damages shall have the right to appeal to the head of the agency of the United States (or the territory or District of Columbia, as appropriate) for which the contract work was performed or for which financial assistance was provided.

(b) *Findings and recommendations of the Agency Head.* The Agency Head has the authority to review the administrative determination of liquidated damages and to issue a final order affirming the determination. It is not necessary to seek the concurrence of the Administrator but the Administration shall be advised of the action taken. Whenever the Agency Head finds that a sum of liquidated damages administratively determined to be due is incorrect or that the contractor or subcontractor violated inadvertently the provisions of the Act notwithstanding the exercise of due care upon the part of the contractor or subcontractor involved, and the amount of the liquidated damages computed for the contract is in excess of \$500, the Agency Head may make recommendations to the Secretary that an appropriate adjustment in liquidated damages be made or that the contractor or subcontractor be relieved of liability for such liquidated damages. Such findings with respect to liquidated damages shall include findings with respect to any wage underpayments for which the liquidated damages are determined.

(c) The recommendations of the Agency Head for adjustment or relief from liquidated damages under paragraph (a) of this section shall be reviewed by the Administrator or an authorized representative who shall issue an order concurring in the recommendations, partially concurring in the recommendations, or rejecting the recommendations, and the reasons therefor. The order shall be the final decision of the Department of Labor, unless a petition for review is filed pursuant to Part 7 of this title, and the Wage Appeals Board in its discretion reviews such decision and order.

(d) Whenever the Agency Head finds that a sum of liquidated damages administratively determined to be due under section 104(a) of the Contract Work Hours and Safety Standards Act for a contract is \$500 or less and the Agency Head finds that the sum of liquidated damages is incorrect or that the contractor or subcontractor violated inadvertently the provisions of the Contract Work Hours and Safety Standards Act notwithstanding the exercise of due care upon the part of the contractor or subcontractor involved, an appropriate adjustment may be made in such liquidated damages or the contractor or subcontractor may be relieved of liability for such liquidated damages without submitting recommendations to this effect or a report to the Department of Labor. This delegation of authority is made under section 105 of the Contract Work Hours and Safety Standards Act and has been found to be necessary and proper in the public interest to prevent undue hardship and to avoid serious impairment of the conduct of Government business.

§ 5.9 Suspension of funds.

In the event of failure or refusal of the contractor or any subcontractor to comply with the labor standards clauses contained in § 5.5 and the applicable statutes listed in § 5.1, the Federal agency, upon its own action or upon written request of an authorized representative of the Department of Labor, shall take such action as may be necessary to cause the suspension of the payment, advance or guarantee of funds until such time as the violations are discontinued or until sufficient funds are withheld to compensate employees for the wages to which they are entitled and to cover any liquidated damages which may be due.

§ 5.10 Restitution, criminal action.

(a) In cases other than those forwarded to the Attorney General of the United States under paragraph (b),

of this section, where violations of the labor standards clauses contained in § 5.5 and the applicable statutes listed in § 5.1 result in underpayment of wages to employees, the Federal agency or an authorized representative of the Department of Labor shall request that restitution be made to such employees or on their behalf to plans, funds, or programs for any type of bona fide fringe benefits within the meaning of section 1(b)(2) of the Davis-Bacon Act.

(b) In cases where the Agency Head or the Administrator finds substantial evidence that such violations are willful and in violation of a criminal statute, the payment of wage underpayments shall not be requested and the matter shall be forwarded to the Attorney General of the United States for prosecution if the facts warrant. In all such cases the Administrator shall be informed simultaneously of the action taken.

§ 5.11 Disputes concerning payment of wages.

(a) This section sets forth the procedure for resolution of disputes of fact or law concerning payment of prevailing wage rates, overtime pay, or proper classification. The procedures in this section may be initiated upon the Administrator's own motion, upon referral of the dispute by a Federal agency pursuant to § 5.5(a)(9), or upon request of the contractor or subcontractor(s).

(b)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that relevant facts are at issue, the Administrator will notify the affected contractor and subcontractor(s) (if any), by registered or certified mail to the last known address, of the investigation findings. If the Administrator determines that there is reasonable cause to believe that the contractor and/or subcontractor(s) should also be subject to debarment under the Davis-Bacon Act or § 5.12(a)(1), the letter will so indicate.

(2) A contractor and/or subcontractor desiring a hearing concerning the Administrator's investigative findings shall request such a hearing by letter postmarked within 30 days of the date of the Administrator's letter. The request shall set forth those findings which are in dispute and the reasons therefore, including any affirmative defenses, with respect to the violations and/or debarment, as appropriate.

(3) Upon receipt of a timely request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the letter from the Administrator and response thereto, for designation of

an Administrative Law Judge to conduct such hearings as may be necessary to resolve the disputed matters. The hearing shall be conducted in accordance with the procedures set forth in 29 CFR Part 6.

(c)(1) In the event of a dispute described in paragraph (a) of this section in which it appears that there are no relevant facts at issue, and where there is not at that time reasonable cause to institute debarment proceedings under § 5.12, the Administrator shall notify the contractor and subcontractor(s) (if any), by registered or certified mail to the last known address, of the investigation findings, and shall issue a ruling on any issues of law known to be in dispute.

(2)(i) If the contractor and/or subcontractor(s) disagree with the factual findings of the Administrator or believe that there are relevant facts in dispute, the contractor or subcontractor(s) shall so advise the Administrator by letter postmarked within 30 days of the date of the Administrator's letter. In the response, the contractor and/or subcontractor(s) shall explain in detail the facts alleged to be in dispute and attach any supporting documentation.

(ii) Upon receipt of a response under paragraph (c)(1)(i) of this section alleging the existence of a factual dispute, the Administrator shall examine the information submitted. If the Administrator determines that there is a relevant issue of fact, the Administrator shall refer the case to the Chief Administrative Law Judge in accordance with paragraph (b)(3) of this section. If the Administrator determines that there is no relevant issue of fact, the Administrator shall so rule and advise the contractor and subcontractor(s) (if any) accordingly.

(3) If the contractor and/or subcontractor(s) desire review of the ruling issued by the Administrator under paragraphs (c)(1) or (2) of this section, the contractor and/or subcontractor(s) shall file a petition for review thereof with the Wage Appeals Board within 30 days of the date of the ruling, with a copy thereof to the Administrator. The petition for review shall be filed in accordance with Part 7 of this title.

(d) If a timely response to the Administrator's findings or ruling is not made or a timely petition for review is not filed, the Administrator's findings and/or ruling shall be final, except that with respect to debarment under the Davis-Bacon Act, the Administrator shall advise the Comptroller General of the Administrator's recommendation in accordance with § 5.12(a)(1). If a timely response or petition for review is filed,

the findings and/or ruling of the Administrator shall be inoperative unless and until the decision is upheld by the Administrative Law Judge or the Wage Appeals Board.

§ 5.12 Debarment proceedings.

(a)(1) Whenever any contractor or subcontractor is found by the Secretary of Labor to be in aggravated or willful violation of the labor standards provisions of any of the applicable statutes listed in § 5.1, other than the Davis-Bacon Act, such contractor or subcontractor or any firm, corporation, partnership, or association in which such contractor or subcontractor has a substantial interest shall be ineligible for a period not to exceed 3 years (from the date of publication by the Comptroller General of the name or names of said contractor or subcontractor on the ineligible list as provided below) to receive any contracts or subcontracts subject to any of the statutes listed in § 5.1.

(2) In cases arising under contracts covered by the Davis-Bacon Act, the Administrator shall transmit to the Comptroller General the names of the contractors or subcontractors and their responsible officers, if any (and any firms in which the contractors or subcontractors are known to have an interest), who have been found to have disregarded their obligations to employees, and the recommendation of the Secretary of Labor or authorized representative regarding debarment. The Comptroller General will distribute a list to all Federal agencies giving the names of such ineligible person or firms, who shall be ineligible to be awarded any contract or subcontract of the United States or the District of Columbia and any contract or subcontract subject to the labor standards provisions of the statutes listed in § 5.1.

(b)(1) In addition to cases under which debarment action is initiated pursuant to § 5.11, whenever as a result of an investigation conducted by the Federal agency or the Department of Labor, and where the Administrator finds reasonable cause to believe that a contractor or subcontractor has committed willful or aggravated violations of the labor standards provisions of any of the statutes listed in § 5.1 (other than the Davis-Bacon Act), or has committed violations of the Davis-Bacon Act which constitute a disregard of its obligations to employees or subcontractors under section 3(a) thereof, the Administrator shall notify by registered or certified mail to the last known address, the contractor or subcontractor and its responsible officers, if any (and any firms in which

the contractor or subcontractor are known to have a substantial interest), of the finding. The Administrator shall afford such contractor or subcontractor and any other parties notified an opportunity for a hearing as to whether debarment action should be taken under paragraph (a)(1) of this section or section 3(a) of the Davis-Bacon Act. The Administrator shall furnish to those notified a summary of the investigative findings. If the contractor or subcontractor or any other parties notified wish to request a hearing as to whether debarment action should be taken, such a request shall be made by letter postmarked within 30 days of the date of the letter from the Administrator, and shall set forth any findings which are in dispute and the reasons therefor, including any affirmative defenses to be raised. Upon receipt of such request for a hearing, the Administrator shall refer the case to the Chief Administrative Law Judge by Order of Reference, to which shall be attached a copy of the letter from the Administrator and the response thereto, for designation of an Administrative Law Judge to conduct such hearings as may be necessary to determine the matters in dispute. In considering debarment under any of the statutes listed in § 5.1 other than the Davis-Bacon Act, the Administrative Law Judge shall issue an order concerning whether the contractor or subcontractor is to be debarred in accordance with paragraph (a)(1) of this section. In considering debarment under the Davis-Bacon Act, the Administrative Law Judge shall issue a recommendation as to whether the contractor or subcontractor should be debarred under section 3(a) of the Act.

(2) Hearings under this section shall be conducted in accordance with 29 CFR Part 6. If no hearing is requested within 30 days of receipt of the letter from the Administrator, the Administrator's findings shall be final, except with respect to recommendations regarding debarment under the Davis-Bacon Act, as set forth in paragraph (a)(2) of this section.

(c) Any person or firm debarred under § 5.12(a)(1) may in writing request removal from the debarment list after six months from the date of publication by the Comptroller General of such person or firm's name on the ineligible list. Such a request should be directed to the Administrator of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, and shall contain a full explanation of the reasons why such person or firm should be removed from the ineligible list. In

cases where the contractor or subcontractor failed to make full restitution to all underpaid employees, a request for removal will not be considered until such underpayments are made. In all other cases, the Administrator will examine the facts and circumstances surrounding the violative practices which caused the debarment, and issue a decision as to whether or not such person or firm has demonstrated a current responsibility to comply with the labor standards provisions of the statutes listed in § 5.1, and therefore should be removed from the ineligible list. Among the factors to be considered in reaching such a decision are the severity of the violations, the contractor or subcontractor's attitude towards compliance, and the past compliance history of the firm. In no case will such removal be effected unless the Administrator determines after an investigation that such person or firm is in compliance with the labor standards provisions applicable to Federal contracts and Federally assisted construction work subject to any of the applicable statutes listed in § 5.1 and other labor statutes providing wage protection, such as the Service Contract Act, the Walsh-Healey Public Contracts Act, and the Fair Labor Standards Act. If the request for removal is denied, the person or firm may petition for review by the Wage Appeals Board pursuant to 29 CFR Part 7.

(d)(1) Section 3(a) of the Davis-Bacon Act provides that for a period of three years from date of publication on the ineligible list, no contract shall be awarded to any persons or firms placed on the list as a result of a finding by the Comptroller General that such persons or firms have disregarded obligations to employees and subcontractors, and further, that no contract shall be awarded to "any firm, corporation, partnership, or association in which such persons or firms have an interest." Paragraph (a)(1) of this section similarly provides that contracts subject to any of the statutes listed in § 5.1 (other than the Davis-Bacon Act) shall not be awarded to "any firm, corporation, partnership, or association" in which a contractor or subcontractor on the ineligible list pursuant to that paragraph has a "substantial interest." A finding as to whether persons or firms whose names appear on the ineligible list have an interest (or a substantial interest, as appropriate) in any other firm, corporation, partnership, or association, may be made through investigation, hearing, or otherwise.

(2)(i) The Administrator, on his/her own motion or after receipt of a request for a determination pursuant to paragraph (d)(3) of this section may make a finding on the issue of interest (or substantial interest, as appropriate).

(ii) If the Administrator determines that there may be an interest (or substantial interest, as appropriate), but finds that there is insufficient evidence to render a final ruling thereon, the Administrator may refer the issue to the Chief Administrative Law Judge in accordance with paragraph (d)(4) of this section.

(iii) If the Administrator finds that no interest (or substantial interest, as appropriate) exists, or that there is not sufficient information to warrant the initiation of an investigation, the requesting party, if any, will be so notified an no further action taken.

(iv)(A) If the Administrator finds that an interest (or substantial interest, as appropriate) exists, the person or firm affected will be notified of the Administrator's finding (by certified mail to the last known address), which shall include the reasons therefor, and such person or firm shall be afforded an opportunity to request that a hearing be held to render a decision on the issue.

(B) Such person or firm shall have 20 days from the date of the Administrator's ruling to request a hearing. A detailed statement of the reasons why the Administrator's ruling is in error, including facts alleged to be in dispute, if any, shall be submitted with the request for a hearing.

(C) If no hearing is requested within the time mentioned in paragraph (d)(2)(iv)(B) of this section, the Administrator's finding shall be final and the Administrator shall so notify the Comptroller General. If a hearing is requested, the ruling of the Administrator shall be inoperative unless and until the administrative law judge or the Wage Appeals Board issues an order that there is an interest (or substantial interest, as appropriate).

(3)(i) A request for a determination of interest (or substantial interest, as appropriate), may be made by any interested party, including contractors or prospective contractors and associations of contractors, representatives of employees, and interested Government agencies. Such a request shall be submitted in writing to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210, to the attention of the Office of Government Contract Wage Standards.

(ii) The request shall include a statement setting forth in detail why the

petitioner believes that a person or firm whose name appears on the debarred bidders list has an interest (or a substantial interest, as appropriate) in any firm, corporation, partnership, or association which is seeking or has been awarded a contract of the United States or the District of Columbia, or which is subject to any of the statutes listed in § 5.1. No particular form is prescribed for the submission of a request under this section.

(4) *Referral to the Chief Administrative Law Judge.* The Administrator, on his/her own motion under paragraph (d)(2)(ii) of this section or upon a request for hearing where the Administrator determines that relevant facts are in dispute, will by order refer the issue to the Chief Administrative Law Judge, for designation of an Administrative Law Judge who shall conduct such hearings as may be necessary to render a decision solely on the issue of interest (or substantial interest, as appropriate). Such proceedings shall be conducted in accordance with the procedures set forth at 29 CFR Part 6.

(5) *Referral to the Wage Appeals Board.* If the person or firm affected requests a hearing and the Administrator determines that relevant facts are not in dispute, the Administrator will refer the issue and the record compiled thereon to the Wage Appeals Board to render a decision solely on the issue of interest (or substantial interest, as appropriate). Such proceeding shall be conducted in accordance with the procedures set forth at 29 CFR Part 7.

§ 5.13 Rulings and interpretations.

All questions relating to the application and interpretation of wage determinations (including the classifications therein) issued pursuant to Part 1 of this subtitle, of the rules contained in this part and in Parts 1 and 3, and of the labor standards provisions of any of the statutes listed in § 5.1 shall be referred to the Administrator for appropriate ruling or interpretation. The rulings and interpretations shall be authoritative and those under the Davis-Bacon Act may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). Requests for such rulings and interpretations should be addressed to the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, Washington, D.C. 20210.

§ 5.14 Variations, tolerances, and exemptions from Parts 1 and 3 of this subtitle and this part.

The Secretary of Labor may make variations, tolerances, and exemptions from the regulatory requirements of this part and those of Parts 1 and 3 of this subtitle whenever the Secretary finds that such action is necessary and proper in the public interest or to prevent injustice and undue hardship. Variations, tolerances, and exemptions may not be made from the statutory requirements of any of the statutes listed in § 5.1 unless the statute specifically provides such authority.

§ 5.15 Limitations, variations, tolerances, and exemptions under the Contract Work Hours and Safety Standards Act.

(a) *General.* Upon his or her own initiative or upon the request of any Federal agency, the Secretary of Labor may provide under section 105 of the Contract Work Hours and Safety Standards Act reasonable limitations and allow variations, tolerances, and exemptions to and from any or all provisions of that Act whenever the Secretary finds such action to be necessary and proper in the public interest to prevent injustice, or undue hardship, or to avoid serious impairment of the conduct of Government business. Any request for such action by the Secretary shall be submitted in writing, and shall set forth the reasons for which the request is made.

(b) *Exemptions.* Pursuant to section 105 of the Contract Work Hours and Safety Standards Act, the following classes of contracts are found exempt from all provisions of that Act in order to prevent injustice, undue hardship, or serious impairment of Government business:

- (1) Contracts of \$2,000.00 or less.
- (2) Purchases and contracts other than construction contracts in the aggregate amount of \$2,500.00 or less. In arriving at the aggregate amount involved, there must be included all property and services which would properly be grouped together in a single transaction and which would be included in a single advertisement for bids if the procurement were being effected by formal advertising.
- (3) Contract work performed in a workplace within a foreign country or within territory under the jurisdiction of the United States other than the following: A State of the United States; the District of Columbia; Puerto Rico; the Virgin Islands; Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (ch. 345, 67 Stat. 462); American Samoa; Guam;

Wake Island; Eniwetok Atoll; Kwajalein Atoll; and Johnston Island;

(4) Agreements entered into by or on behalf of the Commodity Credit Corporation providing for the storing in or handling by commercial warehouses of wheat, corn, oats, barley, rye, grain sorghums, soybeans, flaxseed, rice, naval stores, tobacco, peanuts, dry beans, seeds, cotton, and wool.

(5) Sales of surplus power by the Tennessee Valley Authority to States, counties, municipalities, cooperative organization of citizens or farmers, corporations and other individuals pursuant to section 10 of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 8311).

(c) *Tolerances.* (1) The "basic rate of pay" under section 102 of the Contract Work Hours and Safety Standards Act may be computed as an hourly equivalent to the rate on which time-and-one-half overtime compensation may be computed and paid under section 7 of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 207), as interpreted in Part 778 of this title. This tolerance is found to be necessary and proper in the public interest in order to prevent undue hardship.

(2) Concerning the tolerance provided in paragraph (c)(1) of this section, the provisions of section 7(d)(2) of the Fair Labor Standards Act and § 778.7 of this title should be noted. Under these provisions, payments for occasional periods when no work is performed, due to vacations, and similar causes are excludable from the "regular rate" under the Fair Labor Standards Act. Such payments, therefore, are also excludable from the "basic rate" under the Contract Work Hours and Safety Standards Act.

(3) See § 5.8(c) providing a tolerance subdelegating authority to the heads of agencies to make appropriate adjustments in the assessment of liquidated damages totaling \$500 or less under specified circumstances.

(4)(i) Time spent in an organized program of related, supplemental instruction by laborers or mechanics employed under bona fide apprenticeship or training programs may be excluded from working time if the criteria prescribed in paragraphs (c)(4)(ii) and (iii) of this section are met.

(ii) The apprentice or trainee comes within the definition contained in § 5.2(n).

(iii) The time in question does not involve productive work or performance of the apprentice's or trainee's regular duties.

(d) *Variations.* (1) In order to prevent undue hardship, a workday consisting of a fixed and recurring 24-hour period commencing at the same time on each

calendar day may be used in lieu of the calendar day in applying the daily overtime provisions of the Act to the employment of firefighters or fireguards, under the following conditions: (i) Where such employment is under a platoon system requiring such employees to remain at or within the confines of their post of duty in excess of eight hours per day in a standby or on-call status; and (ii) if the use of such alternate 24-hour day has been agreed upon between the employer and such employees or their authorized representatives before performance of the work; and (iii) provided that, in determining the daily and the weekly overtime requirements of the Act in any particular workweek of any such employee whose established workweek begins at an hour of the calendar day different from the hour when such agreed 24-hour day commences, the hours worked in excess of 8 hours in any such 24-hour day shall be counted in the established workweek (of 168 hours commencing at the same time each week) in which such hours are actually worked.

(2) In the event of failure or refusal of the contractor or any subcontractor to comply with overtime pay requirements of the Contract Work Hours and Safety Standards Act, if the funds withheld by Federal agencies for the violations are not sufficient to pay fully both the unpaid wages due laborers and mechanics and the liquidated damages due the United States, the available funds shall be used first to compensate the laborers and mechanics for the wages to which they are entitled (or an equitable portion thereof when the funds are not adequate for this purpose); and the balance, if any, shall be used for the payment of liquidated damages.

(3) In the performance of any contract entered into pursuant to the provisions of 38 U.S.C. 620 to provide nursing home care of veterans, no contractor or subcontractor under such contract shall be deemed in violation of Section 102 of the Contract Work Hours and Safety Standards Act by virtue of failure to pay the overtime wages required by such section for work in excess of 8 hours in any calendar day or 40 hours in the workweek to any individual employed by an establishment which is an institution primarily engaged in the care of the sick, the aged, or the mentally ill or defective who reside on the premises if, pursuant to an agreement or understanding arrived at between the employer and the employee before performance of the work, a work period of 14 consecutive days is accepted in lieu of the workweek of 7 consecutive

days for the purpose of overtime compensation and if such individual receives compensation for employment in excess of 8 hours in any workday and in excess of 80 hours in such 14-day period at a rate not less than 1½ times the regular rate at which the individual is employed, computed in accordance with the requirements of the Fair Labor Standards Act of 1938, as amended.

§ 5.16 Training plans approved or recognized by the Department of Labor prior to August 20, 1975.

(a) Notwithstanding the provisions of § 5.5(a)(4)(ii) relating to the utilization of trainees on Federal and federally assisted construction, no contractor shall be required to obtain approval of a training program which, prior to August 20, 1975, was approved by the Department of Labor for purposes of the Davis-Bacon and Related Acts, was established by agreement of organized labor and management and therefore recognized by the Department, and/or was recognized by the Department under Executive Order 11246, as amended. A copy of the program and evidence of its prior approval, if applicable shall be submitted to the Employment and Training Administration, Bureau of Apprenticeship and Training, which shall certify such prior approval or recognition of the program. In every other respect, the provisions of § 5.5(a)(4)(ii)—including those relating to registration of trainees, permissible ratios, and wage rates to be paid—shall apply to these programs.

(b) Every trainee employed on a contract executed on and after August 20, 1975, in one of the above training programs must be individually registered in the program in accordance with BAT procedures, and must be paid at the rate specified in the program for the level of progress. Any such employee listed on the payroll at a trainee rate who is not registered and participating in a program certified by BAT pursuant to this section, or approved and certified by BAT pursuant to § 5.5(a)(4)(ii), must be paid the wage rate determined by the Secretary of Labor for the classification of work actually performed. The ratio of trainees to journeymen shall not be greater than permitted by the terms of the program.

(c) In the event a program which was recognized or approved prior to August 20, 1975, is modified, revised, extended, or renewed, the changes in the program or its renewal must be approved by the Bureau of Apprenticeship and Training before they may be placed into effect.

§ 5.17 Withdrawal of approval of a training program.

If at any time the Employment and Training Administration, Bureau of Apprenticeship and Training determines, after opportunity for a hearing, that the standards of any program, whether it is one recognized or approved prior to August 20, 1975, or a program subsequently approved, have not been complied with, or that such a program fails to provide adequate training for participants, a contractor will no longer be permitted to utilize trainees at less than the predetermined rate for the classification of work actually performed until an acceptable program is approved. If the contractor files an appeal pursuant to § 5.18 within 30 days of receipt of a certified letter withdrawing the Bureau of Apprenticeship and Training's approval, the effect of the withdrawal of approval of the program will be delayed until a decision is rendered on the appeal.

§ 5.18 Appeal from Bureau of Apprenticeship and Training's decisions.

(a) Appeal from a withdrawal of approval of a training program by the Bureau of Apprenticeship and Training pursuant to § 5.17 may be made to the Assistant Secretary for Employment and Training, U.S. Department of Labor, Washington, D.C. 20210. Appeals brought more than 30 days after the contractor's receipt of notice of withdrawal of approval of a program will be processed, but the effects of withdrawal of approval of the program will not be delayed during consideration of such an appeal.

(b) Appeal from disapproval of new training programs whose approval is requested pursuant to these regulations may be made to the Assistant Secretary for Employment and Training, U.S. Department of Labor, Washington, D.C. 20210.

(c) The Assistant Secretary for Employment and Training (or designee) shall examine the complete record on the basis of which the denial was issued, including the application for the program, supporting data, Bureau of Apprenticeship and Training decision, and any written argument which the applicant may submit, and any reply thereto by the Bureau of Apprenticeship and Training. Copies of any such reply shall be served on the applicant. The Assistant Secretary, or designee, shall approve or disapprove the decision of the Bureau or shall advise what modifications are necessary for approval of the program. This decision by the Assistant Secretary or designee shall be final.

[FR Doc. 81-1363 Filed 1-12-81; 12:35 am]

BILLING CODE 4510-27-M